INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING ELETTRONICA SICULA S.p.A. (ELSI)

(UNITED STATES OF AMERICA *v.* ITALY)

VOLUME II
Counter-Memorial; Reply; Rejoinder

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE L'ELETTRONICA SICULA S.p.A. (ELSI)

(ÉTATS-UNIS D'AMÉRIQUE c. ITALIE)

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(ELSI)

AFFAIRE
DE L'ELETTRONICA SICULA S.p.A.
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The case concerning *Elettronica Sicula S.p.A. (ELSI)*, entered on the Court's General List on 6 February 1987 under number 76, was the subject of a Judgment delivered on 20 July 1989 by the Chamber constituted by the Order made by the Court on 2 March 1987 (*Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15).

The pleadings and oral arguments in the case are being published in the following order:

Volume I. Application instituting proceedings; Memorial of the United States of America.
Volume II. Counter-Memorial of Italy; Reply of the United States of America; Rejoinder of Italy.
Volume III. Oral Arguments; Documents submitted to the Chamber after the closure of the written proceedings; Correspondence.

In internal references, bold Roman numerals are used to refer to Volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the Volume in question. On the other hand, the page numbers which are preceded or followed by a reference to one of the pleadings only or which appear between square brackets relate to the original pagination of the document in question, which, in general, is not reproduced in the present edition.

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Les pièces de procédure écrite et les plaidoiries relatives à cette affaire sont publiées dans l'ordre suivant:

Volume I. Requête introductive d'instance; mémoire des Etats-Unis d'Amérique.
Volume II. Contre-mémoire de l'Italie; réplique des Etats-Unis d'Amérique; duplique de l'Italie.
Volume III. Procédure orale; documents présentés à la Chambre après la fin de la procédure écrite; correspondance.

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COUNTER-MEMORIAL OF ITALY
CONTRE-MÉMOIRE DE L'ITALIE

INTRODUCTION

In the present proceedings the Government of the United States has attempted to show that the Italian Government is responsible for a number of violations of international law, particularly of the provisions contained in the Treaty of Friendship, Commerce and Navigation between Italy and the United States of 2 February 1948 and the Agreement supplementing the Treaty of 26 September 1951. It is claimed that the alleged violations caused damage to two United States companies, the Raytheon Company and Machlett Laboratories Inc., on behalf of whom the Government of the United States has brought the present action.

In answer to the Memorial submitted by the Government of the United States on 15 May 1987, the Italian Government submits the present Counter-Memorial.

One of the purposes of this Counter-Memorial is to refute the reconstruction of the facts presented by the Government of the United States (Part I).

This part is followed by some considerations concerning the jurisdiction of the International Court of Justice (Part II) and the admissibility of the United States claims (Part III). In Part III the Italian Government lodges an objection on admissibility, which, in the defendant Government's view, should lead to the rejection of the claims.

However, the Italian Government, in order not to hinder the rapid administration of international justice, declares that it would favour the conclusion of an agreement between the parties, under Article 79, paragraph 8, of the Rules of Court, that the objection should be heard and determined within the framework of the merits.

Part IV of the Counter-Memorial deals with points of law relating to the substance of the allegations made by the Government of the United States. In practice, this consists of the interpretation of the above-mentioned 1948 Treaty and 1951 Supplementary Agreement and the problems related to their correct application.

Lastly, Part V of the present Counter-Memorial deals with issues that may be of interest only in the case of some of the claims made by the Government of the United States being upheld by the Court. This Part centres around the methods used to calculate the damage suffered and the evaluation of such damage.

In accordance with Article 49, paragraph 2, of the Rules of Court, the Counter-Memorial finally includes the submissions that the Italian Government respectfully present to the Court.

PART I

STATEMENT OF FACTS

1. Necessity to provide an objective account of the facts which are relevant to the case. — The statement of facts contained in the Memorial submitted by the Government of the United States shows a great many inaccuracies, gaps and tendentious interpretations. It is therefore necessary to run over all the relevant circumstances of the case in order to provide a more complete and above all more accurate account.

2. ELSI's problems from 1962 to 1967; the substantial financial aid given by Italian authorities. — From 1962, the year in which Raytheon became ELSI's controlling shareholder, ELSI proved to be a constant loss-maker, incapable of competing with other companies in the sector. As also the annexes to the claimant Government's Memorial show[1], ELSI's accumulated losses reached Lire 326,900,000 in 1962, Lire 1,228,600,000 in 1963, Lire 284,700,000 in 1964, Lire 361,000,000 in 1965, Lire 2,007,000,000 in 1966, and the record figure of Lire 2,681,300,000 in 1967.

Certainly, ELSI's difficulties were not due to the fact that it was a foreign-owned company[2]. ELSI's main competitors in Italy were in fact also non-Italian companies, namely, Philips, a Dutch company, Siemens, a German company, and Thomas Houston, a French company. The reason why ELSI continued to lose its market shares was due solely to the fact that the competitors managed to offer the same or even superior-quality products at considerably lower prices[3].

And that is not all. Unlike its non-Italian competitors, ELSI was always able to count on substantial financial aid from the Italian Government. Back in 1956, when Raytheon first became a shareholder in ELSI, it successfully requested the Sicilian Regional Government to take a 33.3 per cent stake in the company, and obtained a ten-year low-interest loan of Lire 700 million from the Regional Government through its financial company, IRFIS[4]. Between 1956 and 1966, ELSI was granted further low-interest loans totalling Lire 6,000 million, of which Lire 3,500 million were given in the last four years when the company was wholly controlled by Raytheon[5]. This does not take account of all the other grants of various kinds, such as the tax relief for the merger with the former group company, SELIT, in 1965[6]. This shows that the treatment meted out to ELSI by the Italian authorities was anything but discriminatory.

3. The basic reasons underlying the economic weakness of ELSI. — The truth is that ELSI had been a loss-maker from the very beginning. The bulk of its

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[1] Cf. Memorial submitted by the United States of America (Case concerning Elettronica Sicula S.p.A. (ELSI)) (hereinafter referred to as "Memorial"), Ann. 13, Schedule B1.

[2] Contrary to what Raytheon managers claim, according to what is said in the Memorial, **I**, p. 48.

[3] For an explicit admission in this regard on the part of the ELSI management, see "Project for the Financing and Reorganization of the Company — 1967 Report prepared by Raytheon ELSI S.p.A." (hereinafter referred to as "1967 Report"), Memorial, Ann. 22, **I**, p. 204.

[4] See Letter-agreement of 21 October 1956: Memorial, Ann. 11.

[5] See for these figures "1967 Report", **I**, p. 220.

[6] See doc. No. 31, containing the minutes of the meeting of the ELSI Board of Directors, at which the merger decision was taken.

products were cathode tubes and semiconductors[1] and it is common knowledge that if products of this kind are to make a profit, they must be manufactured in the immediate vicinity of the raw materials suppliers (particularly the producers of glass tubes) and of the customers for the finished products (the radio and TV manufacturers). But ELSI had been set up at Palermo, far away from the large industrial settlements in the North of Italy, with the result that, only because of the extra cost of transportation, the prices of its products were at least 10 per cent higher than those of its competitors[2]. Moreover, some products were being manufactured using methods that were manifestly outdated. This is the case of the semiconductors, whose production line (which ELSI had purchased directly from Raytheon) was technologically obsolete already at the time it was installed[3]. Other products did not have reliable market outlets, or their market was dwindling to nothing. For example, sales of micro-wave tubes depended very largely on sporadic military orders. The cathode-ray tubes, which were solely for black-and-white television sets, were losing their prospective purchasers because in the mid-60s, Italy was about to introduce colour television[4].

All of this was taking place with manifestly disproportionate labour costs. In 1960, the company employed 530 people, rising to over 1,000 in 1967. Training costs were initially amply offset by the lower wages paid to workers in Sicily, but when wages in the area began to draw level with those of the rest of the country, the company's labour costs grew out of all proportion[5].

4. Raytheon's initial apathy towards ELSI; the high cost of its technical assistance. — There can be no doubt that many of ELSI's problems could have been avoided if Raytheon had shown greater concern about ELSI's fate. But it did not. The very decision of acquiring a participation in ELSI was taken on the spur of the moment, rather than as the result of a clearly thought-out plan[6], and even afterwards, as far as its investments in Italy were concerned, Raytheon continued to concentrate its attention on SELENIA. This company, which was controlled by Raytheon jointly with Finmeccanica-IRI and FIAT, manufactured sophisticated military equipment with satisfactory commercial results[7], while ELSI was ignored for many years.

The company continued to be managed by two Italian technicians — Carlo Calosi and Aldo Profumo, as President and Managing Director, respectively — who had already been employed by the former owners: this despite the fact that under their management the company had only recorded losses. Tom Philips, the President of Raytheon from 1964, was reported as having said on the subject of the managerial choices made by the two Italian executives: "[. . .] It seemed that more emphasis was being placed on the social, or rather the societal importance of operations in Sicily than on their need to return profits to their investors[8]". Calosi and Profumo were not, however, dismissed from their posts until 1967 when Raytheon's top management finally realized the desperate straits in which ELSI found itself. But it was too late by then, and all the former President of

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[1] For the exact figures see the "1967 Report", **I**, pp. 212-213.

[2] See Memorial, Ann. 15, **I**, pp. 165-166; Otto J. Scott, *The Creative Ordeal. The Story of Raytheon*, New York, 1974, p. 364.

[3] See Affidavit of Ingegner Busacca (doc. No. 44).

[4] See in this connection the hardly reassuring analyses and predictions made by the ELSI management itself in the "1967 Report", **I**, pp. 205-206 and 214.

[5] See, in this connection, the "1967 Project", **I**, pp. 209-210.

[6] As Scott, *op. cit.*, pp. 246-247, shows, it was owing to ELSI's delay in paying the royalties due to Raytheon that the latter eventually accepted the proposal to convert its loans into shares of what at the time was only an insignificant Palermo-based company.

[7] For these data, see Scott, *op. cit.*, pp. 328-329 and 331-332.

[8] Scott, *op. cit.*, p. 346.

Raytheon, Charles Adams, could do was to let off steam with Calosi: "You have made a terrible mess of things[1]!"

In reality, the company was not only being run at a loss, but was managed on the verge of illegality. It was not without reason that the expert witness for the bankruptcy, Giuseppe Mercadante, said that ELSI's standard practice was to artificially increase the sales volume (probably with a view to showing the parent company in the United States positive results)[2]. The bankruptcy receiver, Mr. Siracusa, commenting on Giuseppe Mercadante's report, put the company's insolvency down to the cavalier way it had been managed and to the "poor organization and mistaken policies of the commercial department"[3].

Raytheon's apathy towards ELSI is demonstrated above all by its very low capital investment in the company. In the period 1962-1966, Raytheon's investments in equity in ELSI totalled a bare 3,600 million.

The inadequacy of these investments to meet the needs of the company is proved by the fact that in 1966, with a share capital of only Lire 4,000 million, ELSI had outstanding debts totalling Lire 15,910 million of which only Lire 4,230 million were guaranteed by Raytheon[4]. This excessive indebtedness naturally gave rise to huge interest charges: Lire 839 million in 1965, Lire 865 million in 1966 and Lire 960 million in 1967. Figures of this magnitude would have caused a crisis in any company, but in ELSI's case the debt burden was absolutely out of all proportion, considering that the company's sales during that same period never exceeded Lire 8,000 million, and that the item "operating profits/losses" (sales minus production costs, after deduction of interest charges) in the 1967 balance sheet showed a loss of Lire 1,721 million[5].

Moreover, while Raytheon left ELSI under-capitalized, it did not hesitate to charge very high rates for the technical assistance it supplied to its subsidiary, right to the very end. In the period 1965-1967, ELSI had to pay about 800 millions a year for "updating, preparation, studies and other work", and yet during the same period a further 650 million was paid for "group assistance royalties, and technical consultancies"[6].

In conclusion, there seems to be good reason for the highly critical judgment of the expert witness Mr. Mercadante on the subject of Raytheon's attitude to ELSI during all those years:

> "[. . .] There are grounds for believing that the parent company, which provided assistance to its subsidiary upon remuneration had ample time to realize that the subsidiary's indebtedness was swelling progressively and growing out of all proportion to the volume of production, and we are surprised that the parent company did not see it fit to bring the subsidiary within more realistic limits[7]."

5. The 1967 report and the search for an Italian partner. — At the beginning of 1967 ELSI's accrued losses had far exceeded one-third of the share capital, with the result that under Article 2446 of the Italian Civil Code ELSI had to reduce its equity from Lire 4,000 to 1,500 million. It was only at this point that Raytheon finally decided to act.

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[1] Scott, *op. cit.*, p. 365.

[2] See doc. No. 36, p. 212, *infra*.

[3] See doc. No. 40, p. 223, *infra*.

[4] "1967 Report", **I**, pp. 220-221, and *ibidem*, App. B2.

[5] Memorial, Ann. 13, Schedule B3.

[6] See doc. No. 36, pp. 214-215 and 209, *infra*.

[7] See *ibidem*, p. 216, *infra*.

A delegation, headed by the Raytheon President, Tom Philips, went to Palermo, and the first thing they did was to replace Carlo Calosi with John Clare as President of ELSI and to appoint Justin J. Guidi as the second managing director of ELSI, alongside Aldo Profumo.

At the request of the parent company, ELSI's new management prepared the "Project for the Financing and Reorganization of the Company — 1967 Report", in which they thoroughly analyzed the causes of the crisis and the possibilities of pulling out of it. The prospects that lay ahead were dramatic. The report made no bones about the fact that, if one had left the company to its own devices, its days were practically numbered: "Given the current product base, the current level of spending and the increasing adverse pressures mentioned above, heavy losses will continue and in all probability increase . . ." (**I**, p. 221); "the current product and people structure of Raytheon ELSI does not produce desirable results, and in fact continued operations on the current basis is quite unsound" (**I**, p. 222). The only chance of survival was indicated to be an intervention by Italian authorities to the effect that, *inter alia*, *(a)* ESPI (Ente Siciliano per la Produzione Industriale) would immediately invest in ELSI Lire 6,000 million as additional capitalization of the company; *(b)* the Central Government would guarantee that over the next four years ELSI would receive government procurement orders for not less than 5,000 million lire; *(c)* the personnel would be given retraining courses organized at the expense of the Sicilian Regional Government; *(d)* the Central Government would undertake to do what it could so that ELSI could obtain all the other financial facilities available under current legislation for the development of Southern Italy (**I**, pp. 222-223).

On being informed of the gravity of the situation, the Italian authorities immediately stated their readiness to examine the possibility of a solution acceptable to everyone in joint consultation with the ELSI management. In no way did they reject altogether the suggestion of public intervention on behalf of the ailing company. It was simply a question of defining the terms of intervention, since it was unthinkable that all of ELSI's demands might be accepted. The Sicilian Regional Government immediately pointed out that the financial contribution it was being asked to make exceeded its resources, and that at all events, it would acquire a direct stake in ELSI only if it was joined by another partner, possibly a company of the IRI group. Raytheon had itself already been in touch with some companies on its own account. But IRI's response was decidedly negative. IRI was studying the possibility of enhancing its own companies' presence in the electronics sector, and it was therefore not at all interested in helping ELSI which — at least according to the restructuring plans elaborated by the company's management — would have inevitably become their direct competitor (for further details, see *infra*, para. 18).

6. ELSI's financial difficulties and the labour disputes: 1967-1968. — Meanwhile, ELSI's difficulties went from bad to worse. The balance sheet of 30 September 1967 closed with a loss of Lire 2,681 million, with the result that less than one year after the last reduction, the company's share capital should have been reduced once again because of losses. The company directors, who, under Article 2446 of the Italian Civil Code, should have asked the shareholders already before the end of the fiscal year "to take the appropriate steps", did nothing of the sort even after that date: and yet the losses continued to increase also in the last quarter of 1967 and the first quarter of 1968. According to the estimates of Raytheon's expert accountant, on 31 March 1968 ELSI had accrued losses of Lire 3,750 million[1]. This being so, ELSI's management clearly failed to comply

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[1] Memorial, Ann. 13, Schedule B1.

with its duties under Italian law to protect the company's creditors (not to mention its shareholders!) in the event of persistent losses totalling over one-third of the share capital[1].

ELSI's financial difficulties were compounded by serious labour disputes during that same period. Already in June 1967, because of the uncertain market prospects and the need to cut its exorbitant production costs, the company had announced the shedding of 300 jobs. Faced with the inevitable protests on the part of the trade unions and the threat of a solidarity strike by all the workforce which would have brought production to a complete halt, the Sicilian Regional Government immediately came to ELSI's rescue. An agreement was concluded under which the company agreed not to dismiss all the 300 employees, but merely to lay off temporarily 168 of them, and the Regional Government undertook to pay the wages of the laid-off workers until they were able to resume work[2]. For a few months, peace was restored in the factory, but at the beginning of 1968, when it became clear that not only would the company never be able to take back the laid-off workers, but also that its days were numbered, serious union unrest resumed. In January and February 1968, the days on which the whole workforce, or specific departments, were on strike were more numerous than those of normal activity. In early March, the company decided to dismiss the 168 laid-off workers.

The reaction of the workforce was immediate. On 4 March 1968 the company's workforce was called out on an indefinite strike, and a sit-in on the factory premises began[3].

To have an idea of the general situation at ELSI at that time, it should be borne in mind that even before the workers' sit-in, precisely on 2 March 1968, all that remained of the company's administration, including its accounting records, was transferred wholesale to a small regional office in Milan[4] and thereafter the Board no longer met at the Palermo headquarters, but began instead to meet in Rome. After January 1968 the accounts for the company's operations were no longer kept properly, and when Arthur Schene, the Vice-President of Raytheon's Board of Auditors was summoned urgently to Italy in early April to draw up the balance sheet for the liquidation of the company, he had to work on the basis of records that had been kept only up to 31 December 1967[5]. Only afterwards, in their petition for bankruptcy, did the directors try to explain this further example of malpractice which — incidentally — is a criminal offence under the Italian Bankruptcy Act[6]. The reasons advanced for having been prevented from keeping the accounts properly were — in order of appearance — the Christmas and the New Year's holidays, the earthquake that struck part of Sicily in January, and the strikes . . .[7].

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[1] For the full text of Art. 2446, Civil Code, see doc. No. 19.

[2] *The Claim of Raytheon Company and the Machlett Laboratories, Incorporated, against the Government of Italy in Connection with Raytheon-ELSI S.p.A.* (hereinafter referred to as "The Claim").

[3] See Memorial, Ann. 81, **I**, pp. 384-385 (containing the decision of the Court of Appeal of Palermo of 24 January 1974); see also "The Claim", p. 233, *infra* [p. 29], where reference is made to "complete strike . . . which was never settled"; a further explicit admission in this connection is made in the explicative report of ELSI Board of Directors, attached to the petition in bankruptcy, see doc. No. 32.

[4] See Memorial, Ann. 30, containing a statement to this effect by Domenico A. Nett, an ELSI Auditor.

[5] See Memorial, Ann. 13, **I**, p. 123.

[6] Compare Arts. 216-217 of the Italian Bankruptcy Act, the full text of which is contained in doc. No. 21.

[7] See Explanatory report on the petition in bankruptcy (doc. No. 32).

7. The decision to liquidate ELSI: the actual prospects of an "orderly liquidation". — On 16 March 1968 the Board of ELSI, "in view of the continuous deterioration of the company's financial situation" decided to put the company into liquidation. More specifically, "production was to be discontinued immediately, whereas commercial activities and employment contracts were to be terminated on 29 March 1968"[1].

According to the United States Government, this decision was taken by ELSI's two shareholders with the view of beginning an "orderly", or as it is elsewhere described, "voluntary" liquidation of the company, "in order to minimize their losses". The claimant Government also contends that only after the Mayor of Palermo had requisitioned the factory the company's financial conditions worsened to such a degree that bankruptcy became inevitable[2].

But this is far from the truth. ELSI's decision to halt production immediately and to stop any commercial activities within two weeks, was by no means a free choice: it was a matter of absolute necessity. On 7 March 1968 Raytheon formally notified ELSI that, even though it had noted that

> "[. . .] Raytheon-ELSI requires additional equity capital in order to continue its operations [. . .] Raytheon company cannot obligate itself further and must decline to subscribe to any further stock which might be issued by Raytheon-ELSI or to guarantee any additional loans which might be made by others to Raytheon-ELSI[3]".

ELSI was therefore certain that it could no longer count on Raytheon for even the slightest help. And since its coffers had dried up a long time earlier, the only way to meet its commitments shortly falling due for payment was to liquidate its assets.

After all, this had been bluntly anticipated by the President of ELSI, John D. Clare, at a meeting on 20 February 1968 with the President of the Sicilian Regional Government, Vincenzo Carollo. According to the full version of the minutes of that meeting, drafted by ELSI, and annexed as Exhibit II-15 to "The Claim",

> "[. . .] CFA [Charles F. Adams, *ed.*] stressed that ELSI cannot survive without immediate cash help, which Raytheon cannot provide. JDC [John D. Clare, *ed.*] drew a precise time chart showing *(a)* Feb. 23 — Board Meeting; *(b)* Feb. 26-29 — inevitable bank crisis; *(c)* March 8 — we run out of money and shut the plant".

Surprisingly, the text of the minutes that appears as Annex 15 to the Memorial, Exhibit B, has been altered, and the words quoted above have been replaced by the insignificant words: "Both CFA and JDC stressed again the urgency of the situation."

Moreover, the conclusive evidence that the liquidation of ELSI, which was decided by the Board on 16 March 1968, was anything but "orderly", is given by the company's balance sheet at that date. On 31 March 1968 the company had outstanding debts totalling Lire 16,292 million, of which Lire 4,855 million was owing to preferential creditors, and Lire 11,435 million to unsecured creditors[4]. To meet these debts, the company had assets whose book value was Lire

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[1] See Memorial, Ann. 31, **I**, p. 278.

[2] See Memorial, **I**, pp. 51 ff.

[3] See Charles F. Adam's letter to John D. Clare, attached as Exhibit III-13 to "The Claim", but omitted in the Annexes to the Memorial.

[4] Memorial, Ann. 13, Schedule F.

17,053 million, but whose quick-sale value had been calculated by ELSI's expert accountants as no more than Lire 10,838 million[1].

Even supposing, for the sake of argument, that everything had gone as planned by ELSI, namely, that the sale of the assets had made Lire 10,838 million[2], after deducting the amount needed to pay the preferential creditors, the remainder would only have been sufficient to pay 50 per cent of the unsecured creditors! But if this is so, it is patently evident that what is now presented as an orderly and voluntary liquidation, decided by the shareholders in order to avoid further losses, was in reality a desperate attempt on the part of an insolvent company to avoid bankruptcy by having its creditors accept an amicable settlement.

The ELSI management were perfectly well aware of the real meaning of the decision taken on 16 March 1968: "With the proceeds of the sale it was ELSI's intention to satisfy all the creditors in an amicable way[3]." Indeed, they also knew perfectly well that in order to succeed in their endeavour they had to obtain at least the tacit approval of all the creditors. If only one creditor had demanded to be paid immediately and in full, bankruptcy would have been unavoidable. This is why the liquidation plan provided for the full payment not only of the preferential creditors but also of the mass of small creditors: as it was stated, the danger was that "[. . .] a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation"[4].

Such a risk apparently represented a sort of nightmare for Raytheon: indeed, despite the fact that it had formally announced that it would never pay ELSI an extra lira, it immediately arranged to pay ELSI Lire 150 million to silence the more unruly among the small creditors[5].

But the large creditors, who were being asked to accept 50 per cent of the amount owed them, were six banks which had outstanding claims of about 9,000 million against ELSI, of which just over a half was guaranteed by Raytheon[6]. In the Memorial of the United States Government one reads that

> "Raytheon reasonably anticipated, however, that the bank creditors with large unsecured, unguaranteed loans would quickly settle their claims at no more than 50 per cent of this value as part of the orderly liquidation, as such a settlement would guarantee prompt and substantial payment, as compared with receiving little or nothing in bankruptcy[7]."

There is no telling whether ELSI's directors really were so sure that they would be able to reach an immediate agreement with the banks: the fact is, that on 1 April 1968, not knowing what the Mayor of Palermo was about to decree, the parties held yet another meeting which came to nothing[1]. Yet the passage just quoted from the Memorial is mentioned not only because it alleges that an agreement between ELSI and the banks was a foregone conclusion, but also because it openly states that the banks had everything to gain by being content with 50 per cent of their loans because "such a settlement would guarantee prompt and substantial payment, as compared with receiving little or nothing in bankruptcy"! This statement clearly implies that from the very moment in which the "orderly" liquidation of ELSI had been decided, the only real prospect for the company was either bankruptcy or an "amicable settlement" with the creditors. And all the parties were perfectly well aware of this: ELSI, Raytheon and the banks!

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[1] Memorial, **I**, p. 108. For an indication of the criteria followed for the determination of the "quick-sale value", see Memorial, Ann. 17, **I**, pp. 184 ff., whereas for a comparison between the different items in the balance sheet and in their estimate quick-sale value, see *ibidem*, Exhibit A.

[2] The hypothesis that the "book value" of 17,053 million could be realized is not even worth being taken into consideration, although the United States Government is now claiming that it was the most likely one (Memorial, **I**, pp. 52 and 107). Not only at the time all ELSI (and Raytheon) plans and calculations were based on the "quick-sale value" (see, in this connection, Charles F. Adams' Affidavit, Memorial, Ann. 9, **I**, pp. 122-123; Arthur Schene's Affidavit, Ann. 13, **I**, p. 132, Joseph A. Scopelliti's Affidavit, Ann. 17, **I**, p. 186), but also in the Raytheon and Machlett claim of 1974 against the Italian Government this was the value which had been chosen for the computing of damages.

[3] See "The Claim", *infra*, p. 233 [p. 33].

[4] *Ibid.*

[5] See Memorial, Ann. 17, **I**, p. 186.

[6] For the exact figures, see Memorial, Ann. 13, Schedule E.

[7] See Memorial, **I**, p. 52.

8. The requisition of ELSI's plant and equipment: its legal basis, nature, justification and effects. — On 1 April 1968, the Mayor of Palermo ordered that the plant and equipment owned by ELSI be requisitioned for a period of six months[2]. This decision is the main point on which the charges made by the Government of the United States against the Italian authorities are hinged. It therefore appears necessary to clarify the nature, the content and the effects of the Mayor's decree.

We shall begin by pointing out that under Italian law the legal basis of the decree is Article 7 of Law No. 2248 of 20 March 1865, Annex E (the so-called administrative litigation law)[3]. The article in question states that

> "when because of grave public necessity, the administrative authorities must dispose of private property without delay . . . the administrative authorities will proceed by means of a decree indicating the reasons, without prejudice to the rights of the parties".

This means that the administrative authorities are empowered to "dispose of private property" and therefore also to take requisition measures, provided that this is justified by a state of "grave public necessity" and of urgency (there is the need to act "without delay"); however, the parties must be ultimately compensated.

If the private property concerned consists of immovable property and it has been requisitioned in accordance with the above-mentioned law, there can only be a *requisition in use*[4]. As a rule, the extension of the requisition measure will depend on the duration of the state of necessity; in any case, the decree itself must be accompanied by an indication of a time-limit (in the case in hand, this was six months) which may be further extended upon expiry. Within this time-limit, the authority can use the immovable property, but cannot acquire it or sell it to others. All this is implicit in the terms "without prejudice to the rights of the parties".

The difference between requisition in use and expropriation is clear: expropriation deprives the private individual of his right of ownership, which is transferred to the administrative authority expropriating the property. On the other hand, requisition in use deprives the owner only of the use of the property over a certain period of time. Under Italian law, expropriation is regulated by specific legislation, notably Law No. 2359 of 25 June 1865 (on compulsory expropriation in the public interest), and is also covered by a provision in the Constitution (Art. 42, paragraph 3, according to which "private property, in such cases as are provided for by law and upon payment of compensation, may be expropriated for reasons of public interest"); requisition in use, on the other hand, is covered by the above-mentioned Article 7 of Law No. 2248 of 20 March 1865.

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[1] See "The Claim", *infra*, p. 233 [pp. 34-35].

[2] See Memorial, Ann. 33.

[3] See *ibid.*, Ann. 34.

[4] See Sandulli, *Manuale di diritto amministrativo*, 13th ed., Naples 1982, p. 789.

Three aspects of the content of the decree issued on 1 April 1968 by the Mayor of Palermo deserve special mention: the provisions explicitly referred to, the detailed reasons given and the measures actually taken. With regard to the first aspect, it is noteworthy that the decree referred not only to the above-mentioned Article 7 of Law No. 2248 of 20 March 1865, Annex E, but also to Article 69 of the regional legislation governing local authorities, namely, Legislative Decree No. 6 of 29 October 1955 of the President of the Sicilian Region[1]. Under the heading of "orders based on emergencies and urgency", the latter provision (para. 1) states that "the Mayor issues emergency and urgent orders in matters of civil works, local police and health for reasons of public health and safety". It thus underlines and defines the Mayor's powers also to take, *inter alia*, urgent measures in local police matters for reasons of public safety. The Mayor's authority to dispose of private property on this basis was considered to be "unchallengeable" (*indubitabile*) by the Prefect of Palermo when he was called upon to rule on the appeal taken by ELSI against the requisition decree we are examining[2]. The decree was justified on a number of circumstances: in the first place the decision by ELSI to shut down its plant and dismiss about one thousand employees, a decision that was followed by the strikes called by trade unions with the support of public opinion. Other relevant considerations were the damage to the local economy, the strong interest shown by the press and the danger of law and order being perturbed. All these circumstances led the Mayor to form the opinion that the conditions of grave public necessity and urgency specified in particular in Article 7 of Law No. 2248 of 20 March 1865 actually existed in the ELSI case.

As already seen, the decree issued by the Mayor of Palermo provided for the requisition, for the duration of six months and "except as may be necessary to extend such period, and without prejudice for the rights of the parties concerned and of third parties", of the plant and equipment owned by ELSI: The same decree acknowledged the right of the company to be paid compensation for the requisition, although the assessment of such compensation was deferred to a subsequent order.

The requisition decree did not deal with the measures to be taken for the purpose of the temporary management of the plant; provision for this was made by the Mayor immediately afterwards by means of separate orders. On 6 April 1968, the Mayor issued a special order entrusting the management of the plant to Mr. Aldo Profumo, the managing director of ELSI, also "for the purpose of avoiding damage to the equipment and machinery due to the cessation of all activities including maintenance"[3]. After Mr. Profumo refused to accept this appointment and to carry out the tasks assigned to him in the interest of ELSI, on 16 April the Mayor wrote to Mr. Silvio Laurin, the senior company director, to notify him that

> "[. . .] in view of the continuing absence of Ingegner Profumo, to whom the management of the requisitioned plant had been entrusted, I hereby appoint you to replace him temporarily in the same capacity with the same powers, functions and limitations. The choice of yourself is justified by the need [. . .]

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[1] See Memorial, Ann. 35.

[2] See *ibid.*, Ann. 76.

[3] See doc. 34.

> to ensure the co-ordination of management activities to safeguard the interests of government authorities and the rights of third parties[1]."

Mr. Laurin accepted the appointment. The Mayor also appointed Mr. Armando Celone and Mr. Nicolo Maggio as his representatives to enforce his orders in the factory[2].

9. Precedents concerning the requisition of plants ordered by other Italian local authorities (1950-1986). — An examination of Italian judicial decisions concerning the requisition of industrial plants during the years 1950-1986 indicates that the requisition of plants was not episodic in nature but was often used to protect existing jobs in plants facing the threat of closure. Under the circumstances, its purpose was that of preventing the financial difficulties of certain companies from having negative repercussions on workers' employment. Emblematic in this regard is the well-known "Marzotto affair", which arose out of the decree to requisition a plant of Marzotto S.p.A. of Valdagno issued by the Mayor of Pisa on 25 June 1968[3]. Another such case is that of a plant of S.p.A. Torrington, a company in liquidation which was requisitioned by the Mayor of Genoa in order to prevent it from being closed down and the employees from losing their jobs[4]. A third case is that of a plant belonging to the Italiana Zuccheri company, which was requisitioned for 90 days by the Mayor of Chieti on 16 July 1974 and handed over to the Abruzzo Development Agency, which was given the task of managing it so as to avoid the suspension of activity and thus to safeguard job stability[5].

Also worth mentioning are the cases of Soc. SITE, whose plant was requisitioned by order of the Mayor of Padua on 29 September 1974 just as it was about to be closed down[6] and Soc. Manifattura dell'Adda. The latter company's plant was requisitioned by the Mayor of Berbenno di Valtellina in order to ensure the continuity of its productive activity, which was considered to be essential for the economy of the area[7].

On other occasions requisition of a company plant has been ordered so as to ward off the negative repercussions on the economy and law and order caused by prolonged suspension of the company's productive activities. This is the case of Soc. Terites and Soc. San Marco, whose plants were requisitioned in order to safeguard the future activity of the plant in the interest of local employment and of law and order[8]. Then there is the case of the plant of Soc. SIDELM, requisitioned by the Mayor of Brindisi on 14 September 1974 for reasons of law and order and to ensure the continuity of productive activity in a plant considered essential for the economy of the area and the public interest[9], and that of the Felice Fossati cotton mills, which was requisitioned by the Mayor of Sondrio on 2 February 1975 in order to ward off the threat to law and order due to the plant closing down[1]. The best-known case is still, however, that of Soc. Eridania, whose plant was requisitioned by the Mayor of Cremona in order to avoid damage to the economy of the area and the threat to law and order caused by the company's plans to close down the plant.

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[1] See doc. 35.

[2] See doc. 33.

[3] See decision No. 3086 of the Court of Cassation of 23 October 1974 (doc. No. 23).

[4] See decision No. 72 of the Council of State, sec. IV, of 7 February 1978 (doc. No. 29).

[5] See decision No. 198 of the Abruzzo Tribunale Amministrativo Regionale of 30 December 1976 (doc. No. 24).

[6] See decision No. 208 of the Council of State, sec. IV, of 25 February 1975 (doc. No. 26).

[7] See decision No. 210 of the Lombardy Tribunale Amministrativo Regionale of 30 July 1975 (doc. No. 27).

[8] See respectively decisions by the Prefect of Milan of 12 November 1971, *Il Foro Italiano-Repertorio* (1972), *Requisizione*, No. 7, and by the Prefect of Cremona of 28 November 1975, *ibidem* (1976), *Requisizione*, No. 23.

[9] See decision No. 3 of the Puglia Tribunale Amministrativo Regionale of 28 January 1975 (doc. No. 25).

A similar decree was issued against Soc. Eridania Zuccherifici Nazionali shortly afterwards, on 5 December 1968, by the Mayor of Ferrara[2].

The above-mentioned cases show that the requisition of the ELSI plant was by no means an isolated event, let alone the result of persecution of a company controlled by United States shareholders. In fact, it is clear that the authority given to the Mayor by Article 7 of Law No. 2248 of 20 March 1865, Annex E, has very often been used in similar cases to that of ELSI.

10. Compensation for the damage caused by the requisition. — It has already been pointed out that the requisition decree of the Mayor of Palermo recognized the principle that ELSI was entitled to compensation. It is true that this recognition was not followed by any action by the Mayor to determine the amount of such compensation. However, it should be borne in mind that some days after the requisition (that is, on 19 April 1968) ELSI lodged an appeal with the Prefect of Palermo, claiming that the decree was illegitimate[3]. After the favourable decision of the Prefect on 29 December 1969, the bankruptcy receiver sued the Ministry of the Interior before the Tribunal of Palermo on 29 December 1969, claiming damages for the requisition[4]. This claim was rejected by a decision of 2 February 1973[5], but this decision was reversed by the Court of Appeal of Palermo on 23 November 1973[6]. The latter decision was upheld by the Court of Cassation on 26 April 1976[7].

Thus, the receiver in the ELSI bankruptcy succeeded in obtaining compensation for the damage caused by the requisition. The damages actually awarded amounted to 5 per cent of the value of the requisitioned property, as assessed by the bankruptcy evaluator (exactly, Lire 114,014,711). Clearly, the claim for damages was based on the premise that the measure was illegitimate, while compensation in the strict sense only applies to the case of a legitimate requisition decree. The Court of Appeal of Palermo, in the above-mentioned decision of 23 November 1973, correctly pointed out that

> "in application of principles of law that have never been questioned, any impediment to the enjoyment of private property is by itself an economic sacrifice and as such gives entitlement to the payment of adequate compensation, when carried out legitimately (e.g., occupation, requisition, etc.) and to the payment of damages when it is illegitimate".

11. Requisition and occupation of ELSI's plant. The impact of requisition on the prospect of an "orderly liquidation". Requisition and bankruptcy petition. — Let us now consider three points in which the version of the facts given by the claimant Government is based on a complete misrepresentation. These points are the problem of the relationship in time between the requisition of ELSI's plant

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[1] See decision No. 21 of Council of State, sec. IV, of 18 January 1977 (doc. No. 28).

[2] On these cases, see respectively decisions by the Prefect of Cremona on 8 December 1968, *Foro Italiano-Repertorio* (1969), *Requisizione*, No. 7, and by the Prefect of Ferrara, quoted in decision No. 405 of Consiglio di Stato, sec. IV, of 8 April 1975, 99 *Il Foro Italiano* (1976) III-14.

[3] See Memorial, Ann. 36.

[4] See *ibid.*, Ann. 79.

[5] See *ibid.*, Ann. 80.

[6] See *ibid.*, Ann. 81.

[7] See *ibid.*, Ann. 82.

and its occupation by ELSI's employees, the question of the effects that the requisition had on the prospect of an orderly liquidation of the company and the issue of whether the requisition actually caused the bankruptcy.

With regard to the first point, it must be recalled that the plant had been occupied by the employees since early March 1968, and not only after the requisition[1]. The claimant Government's allegation that the Italian authorities behaved in such a way as, if not actually to encourage the occupation, at least to make it possible and subsequently to tolerate it[2], is far from being true.

The only action which one way or another succeeded in calming down the ELSI employees, who were exasperated by the company's decision to cease all activity and dismiss all its workforce, was the requisition decreed by the Mayor. Rightly or wrongly the employees saw this as an effective way of safeguarding their position. This is why, after the requisition, the occupation quickly took on a purely symbolic character with all the workers now feeling directly responsible for everything that happened inside the factory. It is a fact that — as expressly stated also in the above-mentioned decision by the Tribunal of Palermo on 2 February 1973 — the occupation not only caused no ascertained damage to the equipment and material located in the factory but did not even prevent the regular performance of the winding-up operations.

With regard to the company's "orderly" liquidation plan and the effects of the requisition on it, it must be pointed out from the outset that ELSI was already insolvent when the requisition decree was issued. The company, whose assets in the estimation of its own management had a quick-sale value of no more than Lire 10,500 million, had accumulated more than Lire 16,000 million in debts. After its two shareholders refused to contribute further capital, the company was forced to liquidate part of its assets to meet its commitments when they fell due. As both Raytheon and Machlett were to state in their 1974 claim against the Italian Government:

> "At the end of the month of March 1968, the situation relating to ELSI was as follows: (. . .) ELSI had run out of money and had no prospect of receiving funds except from the sale of assets (. . .) Substantial payments were due from ELSI, the maturities of which had not been extended[3]."

The "orderly" liquidation decided by the Board of Directors on 16 March 1968 was therefore only a bluff. An "orderly" and voluntary liquidation presupposes that the company has sufficient assets to fully satisfy its creditors[4].

In the case of ELSI it was common knowledge from the outset that in the best possible case the unsecured creditors would receive only 50 per cent satisfaction: had one of them refused the settlement and requested full payment, bankruptcy would have inevitably ensued. Under these circumstances, the ELSI management was under an obligation, also according to criminal law, either to file for bankruptcy or to formally propose an amicable settlement to all the creditors.

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[1] See *supra*, para. 6. The claimant Government's contention that "the occupation began only after the Mayor — an Italian government official — had assumed custody of the plant" (Memorial, **I**, p. 101) contradicts evidence.

[2] See Memorial, **I**, pp. 100 ff.

[3] "The Claim", *infra*, p. 233 [pp. 35-36].

[4] See Arts. 6 and 160 of the Italian Bankruptcy Law (doc. No. 21) according to which it is primarily up to the insolvent enterprise itself to request the declaration of its bankruptcy or alternatively to propose an amicable settlement to the creditors. Accordingly, Art. 217, No. 4, of the same Law states that the debtor shall be sentenced from 6 months to 2 years of imprisonment if he has aggravated the economic situation by abstaining from petitioning for the declaration of bankruptcy or by other serious negligence.

The truth is that ELSI had actually been in a state of virtual liquidation already from the beginning of the year (and its plant had been occupied by the employees ever since early March). If it was not possible to sell on the open market all or part of its assets at the prices fixed in the company's "orderly" liquidation plan, the fault did not lie with the Mayor's requisition, which was issued only on 1 April 1968. The fact is that even before this event no one was willing to purchase at those prices the assets of a company which was clearly insolvent.

In any case, it must be ruled out that the bankruptcy was a consequence of the requisition, as is claimed by the Government of the United States[1]. In this connection, it may be sufficient to recall the statement of the Court of Appeal of Palermo in the above-mentioned decision of 23 November 1973:

> "The fact that the Company was insolvent during the time immediately prior to the Mayor's intervention — in connection with which we recall the many and noisy demonstrations which this gave rise to, as we are reminded by the Court — is sufficient to rule out any causal link between the subsequent requisitioning order and the Company's bankruptcy and that the Company's state of insolvency was decisive and sufficient cause for its failure (Art. 5, Bankruptcy Law)[2]."

12. The appeal against the requisition decree. — The requisition decree of 1 April 1968 was appealed against by ELSI to the Prefect of Palermo 18 days later (on 19 April 1968). A much shorter time was to pass between this appeal and the bankruptcy petition, filed with the Court of Palermo by the company on 25 April. Therefore, while the appeal against the decree was pending, the bankruptcy proceedings were opened. At the same time increasing efforts were made to find a definitive solution to the problems of the company. It can therefore be said that, from the month of April 1968 onwards, three parallel events were in progress: the appeal proceedings against the requisition decree, the bankruptcy of the company, and the rescue operation in which IRI became more and more involved. We shall describe each of these events, taking the interactions between them into account.

13. The decision taken by the Prefect of Palermo on the appeal. — The ELSI appeal to the Prefect of Palermo requested the setting aside of the requisition decree. It was claimed on the one hand that the laws on which the requisition was based (Art. 7 of Law No. 2248 of 20 March 1865, Ann. E; Art. 69 of the Legislative Decree No. 6 of the President of the Sicilian Region of 29 October 1955) had been violated and, on the other, that the Mayor had misused his powers. It should be noted that the Prefect's decision of 22 August 1969 rejected the arguments concerning the first issue and thus ruled that the above-mentioned laws had been correctly applied. In particular, the Prefect pointed out that

> "it is undisputed, in case law and legal doctrine, that the Public Administration is empowered by the above-mentioned Article 7 to dispose of the private property whenever the necessity exists to face a situation of actual and imminent danger for a public interest (public health, public order, etc. . . .) and therefore the grounds of an urgent emergency are given".

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[1] See Memorial, **I**, pp. 83-84.

[2] Memorial, Ann. 81, **I**, p. 382. Art. 5 of the above-mentioned Bankruptcy Law states:

> "Any entrepreneur in a state of insolvency shall be declared bankrupt. The state of insolvency is revealed by cases of default or by other external facts which indicate that the debtor is no longer able to meet his obligations regularly."

However, the Prefect ruled that the decree appealed against was nevertheless illegitimate since, in his view, "the purpose the goal to which the requisition was directed could not be actually achieved by the order"; in other words, the Mayor had not taken account of the fact that the company could not continue its activity unless there were interventions capable of solving its financial and industrial problems. This was the only reason why the Prefect upheld the appeal and set the requisition decree aside.

14. The delay of the Prefect's decision. — One of the charges made by the Government of the United States against the Prefect's decision is that it was delayed. It was in fact delivered 16 months after the appeal taken by ELSI. The claimant Government contends that this delay was quite unusual for normal Italian practice and that at the time the requisition was declared illegitimate, it had already irremediably produced its effects[1].

With regard to Italian practice the Government of the United States relies on an affidavit by the legal counsel of Raytheon[2], to the effect that the average time taken by Prefects to decide upon appeals against requisition orders issued by Mayors is about one month. The Chief of Staff of the Italian Ministry of the Interior has instead declared that the average time is about one year[3].

Quite apart from this, three significant circumstances must be pointed out. In the first place, it must be recalled that, in accordance with Article 5, paragraph 5, of the Consolidated Law No. 383 of 3 March 1934 (Municipal and Provincial Law),

> "[a]fter 120 days from the date of the filing of the appeal without the authority with which the appeal has been filed having ruled on the said appeal, the appellant may request the authority, after notifying it by means of a petition, that the appeal be ruled upon[4]."

In the case in hand a request was made to the Prefect only on 9 July 1969 and the appeal was decided upon about a month and a half later. In the second place it should be pointed out that the requisition had already ceased to have any effect on 30 September 1968, that is, at the date of expiry of its normal term of six months. By this date the effects of the requisition and those of the bankruptcy, declared on 16 May 1969, had already long overlapped as far as the availability of the plant and its equipment were concerned. Therefore even if the Prefect had decided on the appeal against the requisition within a month, ELSI would not have anyway been able to make free use of the requisitioned property. Furthermore, if the requisition was to be regarded as the cause of the bankruptcy, as the claimant Government contends, the relevant delay in the Prefect's decision did not go beyond the seven days elapsing between the presentation of the appeal to the Prefect (18 April) and the date when the bankruptcy petition was filed (25 April). In fact, from the point of view of the availability of the plant it would have obviously been of no use to succeed in an appeal to the Prefect after the bankruptcy petition had been filed.

Lastly, it must be emphasized that the Prefect's decision had the only effect that it was actually capable of producing, that is, it created the preliminary conditions needed for the receiver in the bankruptcy proceedings to take action against the Ministry of the Interior before the Tribunal of Palermo for the purpose of claiming damages for unlawful requisition. This claim was brought four months later, on 29 December 1969, and, as has already been mentioned, was successful[1].

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[1] See Memorial, **I**, p. 99.
[2] See *ibid.*, p. 64.
[3] See doc. 30.
[4] See doc. 20.

15. The episodes characterizing the bankruptcy proceedings: 1968-1969. — Let us now examine the episodes characterizing the bankruptcy proceedings, which opened, as we have seen, with the decision of the Tribunal of Palermo of 16 May 1968 upholding the petition filed by ELSI on 25 April.

By way of introduction, it is to be recalled that, under Italian law, the judicial authorities concerned with bankruptcy proceedings (i.e., the bankruptcy court and the delegated judge) have the statutory aim of ensuring the best possible satisfaction of the interests of all the creditors through the liquidation of the bankrupt's assets. For his part, the receiver, in his capacity of public official, acts as a close collaborator of the delegated judge.

The Government of the United States casts some doubts about the objectivity of the authorities dealing with the ELSI bankruptcy. It further contends that the Italian Government "discouraged private bidders, boycotted the auctions itself, and worked out special arrangements for a piecemeal take-over directly with the bankruptcy authorities"[2].

In actual fact, three of the auctions called by the delegated judge (held on 18 January 1969, 22 March 1969 and 3 May 1969, respectively) were unattended and only at the fourth auction (held on 12 July 1969) did ELTEL, a new company of the IRI-STET group, make a bid, which was accepted in the absence of any other bidders. This in no way implies that irregularities were committed by the Italian authorities. Any bidders interested were invited to participate as is shown by the fact that extensive publicity was given to individual sales announcements published also in the foreign press (see the advertisements in *Corriere della Sera, Sole-24 Ore, Il Globo, Financial Times, The New York Times, Frankfurter Allgemeine Zeitung, Le Monde, Le Soir, De Telegraaf, The Nihoneiza Shimbun*)[3].

At the beginning of April 1969, that is between the second and the third auction, the delegated judge of the bankruptcy court, at the request of the receiver and with the support of the majority of members of the creditors' committee, authorized the lease of the ELSI plant to ELTEL for a period of 18 months. Raytheon contended that the lease represented a prejudice to the creditors because it made in fact impossible a sale to third parties other than ELTEL of the plant or of individual separate lines[4]. However, the Tribunal of Palermo, in rejecting this contention, did not fail to point out that the lease was actually advantageous for the creditors since, far from making the sale of the plant impossible, it actually made the sale easier, in that ELTEL was under obligation to maintain the plant in perfect efficiency and to carry out all the repairs and replacements due to normal wear and tear[5]. No appeal against this decision of the Tribunal of Palermo was taken by Raytheon.

16. The sale of the supplies and of the ELSI plant. — On 5 May 1969 the bankruptcy judge authorized the sale to ELTEL of the material existing on the production lines at the price of Lire 105 million. The Government of the United States now describes this operation as a sell-out, by arguing that the price paid by ELTEL amounted to barely 48 per cent of the inventory value of the material in question[6]. However, it fails to consider that while judicial valuator Mr. Di Benedetto had indeed assigned an inventory value of Lire 217 million to the

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[1] See Memorial, Anns. 79-82.

[2] See Memorial, **I**, p. 85.

[3] See "The Claim", Exhibit III-19, no longer attached to the Memorial.

[4] See Memorial, Ann. 62.

[5] See *ibid.*, Ann. 64, **I**, p. 342.

[6] See *ibid.*, **I**, pp. 61-62 and 87.

material in question, ELSI itself had previously valued it at only Lire 193 million[1]. Furthermore, it must not be overlooked that the receiver himself, in his request for sale authorization, pointed out that the material was more than one year old and therefore hard to market, and that its removal from the production line would further reduce its value[2]. Lastly, if the operation was truly so suspect, why did Raytheon merely express its reservations at the meeting of the creditors' committee and not appeal to the court against the authorization given by the delegated judge?

On 12 July 1969 the fourth auction for the sale of the ELSI plant was held. The plant and equipment were put up for sale at the starting price of Lire 3,200 million, and the supplies, excluding raw materials and finished products, together with the semi-finished products for semiconductor production, at the starting price of Lire 800 million.

The only bidder at the auction was ELTEL, to whom the whole lot was adjudicated for a total price of Lire 4,006 million. According to the claimant Government this was a ridiculously low price that ELTEL allegedly managed to impose by virtue of the fact that it was already in renting of the plant. Allegedly, the Italian Government thus achieved its aim of having IRI purchase the ELSI assets "without paying a freely market-determined price"[3]. In this connection, it is necessary to clarify a gross misunderstanding. At the stage that matters had reached (as this was the fourth auction after the first three had been unattended) it was out of the question that the sale of the plant could take place according to a "freely market-determined price": the question is therefore not to see whether ELTEL had purchased "at less than fair market price" or at a "reduced price"[4] but only whether the price paid could be considered reasonable in the circumstances.

17. The value of the property in question and the price paid by ELTEL. — The first thing to establish is the value of the property in question according to the various previous estimates. The claimant Government refers to an alleged "book value" of Lire 12,000 million[5] although this is a totally unreliable figure. This value is based on the last balance sheet drawn up by ELSI more than one year earlier (31 March 1968) and without the support of regular accounting. Furthermore, it refers, in addition to the plant and equipment, to all the supplies existing at the time, while the supplies acquired by ELTEL at the auction were very limited, as many articles had been previously sold by the receiver and also the remainder was exclusive of all raw materials and finished products, as well as semi-finished products for semiconductors. Only two estimates can be taken into consideration with reference to the value of the assets in question: the quick-sale value, worked out by the ELSI management itself before deciding to wind up the company and the judicial evaluation carried out by Ingegner Puglisi on 12 October 1968[6].

If we take either of these two estimates as a reference, the value of the assets actually purchased by ELTEL basically corresponds to the price adjudicated at the auction.

All that remains to be done at this point is to examine the prices set in the various individual auctions and to see how the final figures were arrived at. The starting price set for the first auction was Lire 4,650 million (for plant and equipment alone). For the second auction the starting price was fixed at Lire 6,223 million (Lire 4,000 million for the plant and Lire 2,223 million for the supplies). A few days earlier, ELTEL had sent the bankruptcy judge a documented valuation made by the Siemens technical office, giving the current value of the ELSI plant and equipment as not exceeding Lire 2,770 million[1]. The judge maintained the previously fixed price and the auction was unattended. The starting price for the third auction was fixed at Lire 5,000 million (Lire 3,200 million for the plant and Lire 1,800 for the supplies). ELTEL made it known that it was willing to pay the requested price for the plant, but that in no case was it willing to bid for the supplies, which it considered quite useless[2]. The delegated judge nevertheless remained firm in his decision to auction off plant and supplies. The third auction was also unattended. ELTEL relented and, on 27 May 1969, informed the delegated judge that it would be prepared to purchase the entire lot at a price of Lire 4,000 million[3]. After requesting and obtaining the approval of the receiver and the creditors (among the latter, only the Raytheon representative expressed strong reservations), the delegated judge set the starting price for the fourth auction at Lire 4,000 million (Lire 3,200 for the plant and Lire 800 for the supplies). It should be noted that this price only apparently coincided with that offered by ELTEL, as the latter referred to all the supplies contained in the stores, while the lot auctioned by the judge excluded all the raw materials and finished products, as well as semi-finished products for semiconductors. Nevertheless Raytheon appealed to the Court against the delegated judge's order, but its appeal was rejected by the Court on 20 June 1969[4].

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[1] See "The Claim", *infra*, p. 233 [p. 57].
[2] See Memorial, Ann. 69.
[3] Memorial, **I**, p. 63.
[4] Memorial, **I**, respectively pp. 85 and 87.
[5] *Ibid.*, p. 97.
[6] See "The Claim", Exhibit II-41, no longer attached to the Memorial.

In view of the above considerations it can be concluded that the price paid by ELTEL at the bankruptcy auction was perfectly reasonable. In this context, it may be recalled that, in the 1974 Claim put forward against the Italian Government by the applicant Government on behalf of Raytheon and Machlett, it was contended that the price paid by ELTEL was only 300, or at most 500, million Lire less than the estimated realization value of the property in question[5]. This is an understandable difference considering that ELTEL was purchasing at a fourth bankruptcy auction, after three auctions had been unattended!

18. The role played by IRI from 1967 to March 1968. — It may be useful to add some explanations concerning the role played on several occasions by IRI in the attempt to rescue ELSI.

A fact of considerable interest for a correct understanding of the matter is that IRI (Istituto per la Ricostruzione Industriale) is a public enterprise which has numerous interests in private companies. By law it must act in accordance with the principle of profitability (see Art. 3 of Law No. 1589 of 22 December 1956) and enjoys full managerial freedom. Naturally, its legal personality is distinct from that of the State. Only in exceptional circumstances, when it is a matter of protecting general interests such as the safeguarding of employment, can the Government give IRI some directives (e.g., the purchase of unprofitable companies). However, even in such cases the decisions made by IRI are attributable to IRI itself and not to the State.

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[1] See Considerations by SIT-Siemens of 5 March 1969, contained in "The Claim", Exhibit III-32, omitted in the annexes to the Memorial.

[2] See the petition of 16 April 1969 annexed to "The Claim", Exhibit III-33, omitted in the annexes to the Memorial.

[3] See Memorial, Ann. 70.

[4] See the copy of the claim and the decree annexed to "The Claim" as Exhibit 38, but later omitted.

[5] "The Claim", *infra*, p. 233 [p. 66].

In the case in hand, the suggestion that IRI should intervene was first made by Raytheon. It should be recalled in this connection that, because of the serious crisis affecting its Palermo subsidiary, as early as Spring 1967 Raytheon had requested that IRI should purchase an interest in ELSI and thus help to improve its situation. The request was rejected for a very simple reason. According to the reorganization plan drawn up at that time by the new ELSI management, the company was to expand mainly in the telecommunications sector, that is, in a sector in which several companies belonging to the IRI group were already operating. ELSI would therefore have become a direct competitor[1]. IRI's response in early 1968 was to take a firm stance:

> "IRI and Finmeccanica point out that in this new ELSI report there seems to be little justification for modifying the opinion on the ELSI situation which they expressed at the previous meeting with Raytheon. The financial support to be provided by the proposed new capital of 6 billion lire is not in itself sufficient to improve significantly the basic operating position of the company, which remains in an extremely serious condition notwithstanding the praiseworthy efforts made by Raytheon to achieve a sound basis of operations [. . .] IRI and Finmeccanica point out that within the IRI Group there were no concrete possibilities of ensuring a direct market outlet for Raytheon-ELSI's production. The only exceptions to this statement concern areas of marginal interest, or areas in which other IRI companies, which already have substantial problems of their own to be solved, are currently operating [. . .][2]."

It is true that IRI did not exclude the possibility of a reappraisal some time in the future.

> "However, IRI desires to point out that, even though — with great regret — it cannot accept Raytheon's request at this time, it remains possible that a later request by Raytheon might receive more favorable consideration [. . .][3]."

Nevertheless, this was said out of pure courtesy, and is explained by the excellent relations till then prevailing between IRI and Raytheon.

At the time the Italian Government refrained from putting pressure on IRI to obtain its involvement. The situation changed considerably after ELSI's decision to cease its activity and to liquidate its assets. ELSI's desperate financial straits clearly indicated that only a large-scale intervention could avoid collapse with the consequent loss of more than one thousand jobs. Since the Sicilian Region had immediately stated the condition that any financial aid on its part would be dependent on IRI participation in the rescue operation, the Central Government now made it clear that it would do everything to convince IRI to accept.

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[1] See "1967 Report", which expressely states, at **I**, p. 215:

> "The third possible group, which would certainly represent the major build up of new products, could come from government-owned agencies in Italy [. . .]. As an example, a large part of the communications equipment for the Italian PTT and the Concessionary Companies is manufactured by IRI Companies [. . .]. There is certainly every reason why future telephone switching equipment and other communications for use in Sicily and Southern Italy could and should be made in Sicily in Raytheon-ELSI."

[2] See Memorial, Ann. 15, Exhibit C, containing the summary of the talks held at IRI on 4 January 1968, between IRI Management, the Chairman of Finmeccanica and Mr. John D. Clare.

[3] *Ibidem*.

It should be noted, however, that if the Italian Government had really intended to have IRI buy up the ELSI factory cheaply, the easist way to do so would have been to reject Raytheon's desperate requests for funds and to let ELSI's financial conditions deteriorate until bankruptcy became inevitable. And if, as was actually to happen, the shareholders of the company refused to come to terms with reality, bankruptcy could easily have been requested by one of the creditor banks.

Instead, the behaviour of the Italian Government was quite the opposite: it immediately declared its availability to come to ELSI's help and even when the ELSI shareholders tried to force its hand, ignoring the company's longstanding insolvency, and pretending to carry out an orderly liquidation, it continued to seek a solution which would be acceptable for all concerned. This would indeed have been a peculiar attitude to adopt for someone pursuing the diabolical aim of trying to take property for the benefit of IRI! Nor could it be claimed that the first step in this direction was the order to requisition the factory, which was alleged to have caused ELSI's bankruptcy and all the ensuing events. The first reason for this is, as already said, that it was not the requisition order which caused ELSI to go bankrupt as the company was already insolvent. In the second place the requisition was evidently a simple emergency measure, taken mainly for the purpose of avoiding any possible disorders due to the dismissal of ELSI employees decided by the company management on the previous day. Moreover, the fact that all parties concerned considered it to be little more than a temporary nuisance is shown by the fact that negotiations for the public rescue of ELSI continued without slackening even afterwards and that ELSI itself allowed 19 days to go by before lodging an appeal against the Mayor's decree.

The truth is that the impossibility of reaching an agreement concerning the timing and procedure of IRI action in favour of ELSI, which was then recommended by all concerned, was not the fault of the Italian authorities but of Raytheon. Raytheon was perfectly aware that the Italian authorities would never accept that ELSI's activities ceased overnight, leaving more than one thousand employees jobless. Taking advantage of this fact, Raytheon continued to act as though the ELSI crisis was none of its business and as though it was the concern of the Italian authorities to provide for the company and its creditors.

19. The Italian authorities' proposal for a settlement in March and April 1968. — At the end of March 1968, that is, after ELSI's decision to cease its activity and to proceed to an "orderly" liquidation, but before the requisition decree, the Italian authorities asked Raytheon to reopen the factory and not to send the dismissal letters as announced. In return the Government would pay the wages and shoulder most of the operating losses, until such time as a public company could open negotiations with ELSI for the purchase or lease of its assets. Raytheon refused[1].

The same proposal was renewed to the company one month later, but Raytheon again refused. This time, however, its acceptance would have entailed the immediate revocation of the requisition order, which the Mayor of Palermo had in the meantime issued, as well as the pledge of the Italian authorities that, once productive activity would have been resumed, by means of a special management company to be set up together with the Sicilian Region and IRI, "everybody, including the Region and IRI, shall be ready to help Raytheon and in the meantime to liquidate ELSI through a useful sale in the shortest possible time"[2]. In an attempt to justify the undue intransigence of Raytheon, the applicant Government now claims that, by means of this proposal, "[a]fter having requisitioned ELSI's plant and other tangible assets, Italian authorities pressured Raytheon to reopen ELSI at Raytheon's own expense"[1]. In actual fact, the establishment of the new operating company would have required not the paying-up of any new capital, but merely Raytheon's willingness to cover 40 per cent of the probable operating losses, while the remaining 60 per cent would be covered by the Region and IRI.

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[1] See Memorial, Ann. 15, Exhibit G, **I**, p. 181.

[2] See *ibid.*, Ann. 38, **I**, p. 298; see also Memorial, Ann. 37.

However, the crucial point was a different one: Raytheon, although it had made out that it intended to proceed with the "orderly" liquidation of ELSI, knew very well that only an agreement with the banks would allow it to avoid having to honour the guarantees extended to ELSI. And since, up to that time, the banks had shown little inclination to come to terms with Raytheon, it may be concluded that the latter had every interest in allowing the situation to worsen in the hope that, faced with the prospect of losing everything, the banks would soften their attitude. These appear to be the real reasons why Raytheon refused the proposals made by the Italian Government. The fact that, six days later, ELSI filed for bankruptcy with the Tribunal of Palermo, also appeared as an attempt to force the hand of the banks, which had previously seemed reluctant to accept a negotiated solution. Nevertheless the Italian authorities continued their efforts to find a satisfactory solution for all concerned.

During the same period, the President of the Sicilian Region, Mr. Vincenzo Carollo, again according to the Government of the United States[2], threatened the Raytheon management because of their refusal to reopen the plant. In fact, in the attempt to save jobs, President Carollo merely made a few reasonable predictions and several personal remarks. So when he stated that

> "[n]obody in Italy shall purchase, that is, IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprises shall not purchase [. . .] the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed,"

he announced perhaps somewhat undiplomatically something that was really quite obvious: namely, that the Italian administrative authorities would not view with favour liquidation plans such as those envisaged by ELSI, as they were incompatible with any realistic reorganization plan. But also the further "threat" that

> "[t]he banks which have outstanding credits for approximately 16 billion lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level [. . .] It is obvious that every attempt will be made (even at the cost of long litigation) to obtain from Raytheon what is owed by ELSI [. . .]"

is not at all strange. In fact, it is only to be expected that the banks would attempt to recover their loans to ELSI also from Raytheon seeing that the latter held 99 per cent of the equity. All the banks actually claimed payment of the ELSI debts from Raytheon, but those claims were rejected by the Italian courts[3]. This despite the existence of a number of authoritative doctrine and decisions which claim that the principle embodied in Article 2362 of the Civil Code, according to which a sole shareholder is liable for the company's debts in the case of insolvency[1], equally applies whenever an insignificant number of shares is being held by figureheads or controlled companies[2]. Then there is the final remark by President Carollo that "[i]n the event that the plant shall be kept closed [. . .] the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by [. . .]". Despite the efforts by the United States Government[3] to show that this was a threat to maintain the requisition for an indefinite period, it was actually a prediction of what could have happened, but in fact did not occur as the effects of the requisition decree expired after six months.

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[1] See Memorial, Ann. 47.

[2] Cf. Memorial, **I**, pp. 55-56.

[3] See, in particular, Court of Cassation, decision No. 5143 of 7 October 1982 (final judgment against the Cassa Centrale di Risparmio Vittorio Emanuele); Court of Cassation, decision No. 6712 of 9 December 1982 (final judgment against the Banca Commerciale Italiana); Court of Cassation, decision No. 2879 of 9 May 1985 (final judgment against the Credito Italiano). The texts of the three decisions are attached as documents Nos. 41-43 to the present Counter-Memorial.

20. The attitude of the Italian authorities in the following months. — On 25 July 1968 the Minister for Industry and Trade announced in Parliament that two measures had been adopted in favour of ELSI. The first, of a temporary nature, consisted in the pledge by the Sicilian Region to continue to pay the employees' wages for two months after the company would have resumed activity; a total of Lire 700 million was appropriated for this purpose[4] The second consisted of the establishment of a management company by the Region and other public agencies which would allow productive activities to be resumed until such time as the financial problems of ELSI could be finally resolved, if possible through settlement out of court[5].

The true objective of the Italian authorities thus remained negotiated settlement. For this purpose contact was resumed with Raytheon and, after a number of meetings held during the Summer, it seemed that an agreement was just round the corner: an IRI Group company would purchase the plant as it was, without the supplies (i.e., only the fixed assets) for the price of Lire 4,000 million. These funds, plus the revenue from the sale of the remaining company assets, would be used to pay the costs of bankruptcy and the secured creditors in full, as well as 40 per cent or even 50 per cent of the claims of the unsecured creditors, while Raytheon would not have to honour the guarantees extended to ELSI. However, on 14 October, after an eventful meeting held in Rome at the Ministry of the Budget and Planning, the parties separated without reaching an agreement.

The United States Government now claims, on the basis of evidence given by Raytheon's counsel[6], that the Italian Government was entirely responsible for the breakdown in negotiations since, for unspecified "political reasons", it "had decided to allow IRI to take over ELSI's assets without a creditor settlement". This is completely untrue. The negotiation of the above-mentioned agreement came to grief not because of the Italian Government (which had no cause to do so) but because of the creditor banks, for a very simple reason: the banks, who might have been willing to accept 50 or even 40 per cent and to free Raytheon from its guarantee obligations, realized that the ELSI assets were not enough to pay such a percentage. The assurances to the contrary given by the Raytheon management[7] did nothing to change this. In fact, the Raytheon estimates were based on the quick-sale value of the ELSI assets according to the valuation made by the company management itself six months earlier. Already dubious at the time they were made, these estimates were even less reliable six months later, in full bankruptcy proceedings.

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[1] Doc. No. 18.

[2] See, among others, Bigiavi, *L'imprenditore occulto*, Padua, 1964, pp. 185 et seq.; Ascarelli, *Foro Italiano* (1950), I, 1114; Ferri, *Le Società*, Turin, 1985, pp. 390 et seq.

[3] See Memorial, I, p. 56.

[4] See docs. Nos. 37-39.

[5] See Memorial, Ann. 46.

[6] See *ibid.*, Ann. 29, I, p. 246.

[7] See *ibid.*, I, p. 58.

On 13 November 1968 the Italian Government issued a special press communiqué that

> "[w]hile the STET Group remains committed to build a new plant in Palermo for the production of telecommunication products, the IRI-STET Group, urged by the Government, after the examination of alternative solutions which proved unfeasible, stated its willingness to intervene in the take-over of the [ELSI] plant in the organization of new lines of production[1]".

The United States Government contends that the Italian Government thus interfered unduly in the ongoing bankruptcy proceedings: by publicly announcing its intention to take over the ELSI assets at all costs, it was allegedly discouraging other possible bidders from competing at the later auctions[2].

However this allegation is totally unfounded. The announcement in question was made when it was clear that there was no other way out and for the sole purpose of reassuring public opinion in Palermo, which was understandably exasperated after months of vainly waiting for a possible solution to the dramatic ELSI crisis. A perusal of the announcement reveals that IRI was actually only following a definite Government directive and that the Government itself was perfectly aware that the acquisition of the plant was a very poor bargain. This is the only possible explanation for the initial assurance that the purchase of ELSI's plant would in no way have jeopardized the implementation of the original STET project to build a new plant, also in Palermo, and for the final mention of the commitment to start up new production lines in ELSI's plant. There was therefore no danger of discouraging other possible buyers from bidding for the factory. After all, six months after ELSI had filed for bankruptcy (and eight months after the announcement that it was being wound up) only two enterprises — General Instrument and Compagnie Sans File — had come forward and both were interested solely in leasing the plant once it had been purchased by others. Therefore, the announcement of 13 November 1968 merely gave those concerned the certainty that the solution to the crisis was close at hand. In fact, the above-mentioned four auctions for the sale of the ELSI factory were held by the receiver the following year (18 January, 22 March, 3 May, 12 July 1969) and led to the final purchase of the plant by ELTEL.

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[1] See Memorial, Ann. 47.

[2] See *ibid.*, Ann. 29, Exhibit 4A.

PART II

THE JURISDICTION OF THE COURT

In view of Article XXVI of the 1948 Treaty of Friendship, Commerce and Navigation (the "Treaty") between Italy and the United States, the Italian Government fully recognizes the Court's jurisdiction over the dispute in so far as it relates to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement.

The Italian Government respectfully calls the Court's attention to the fact that, under Article XXVI of the Treaty, jurisdiction only exists with regard to "any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy". The provision appears to require, as a condition for submitting a dispute unilaterally to the Court, that the basic contentions concerning the interpretation or the application of the Treaty should have first been put forward in diplomatic negotiations. A dispute between the Parties with regard to the principal legal issues[1] could not otherwise be held to exist.

In the "Memorandum of Law in Support of the Claim of Raytheon Company and the Machlett Laboratories, Incorporated, Against the Government of Italy in Connection with Raytheon-ELSI S.p.A."[2] submitted by the claimant Government, the "Summary of Legal Arguments" (pp. 276-277, *infra*) referred to Articles V, paragraph 2, VI and VII, of the Treaty, Article I and/or paragraph 2 of the Protocol and Articles I and V of the Supplementary Agreement. In the conclusions to its Memorial, the claimant Government no longer alleges violations of Article VI of the Treaty, Article I and/or paragraph 2 of the Protocol and Article V of the Supplementary Agreement; on the other hand, violations of Articles III, paragraph 2, and V, paragraphs 1 and 3, of the Treaty are also maintained. The latter provisions had only been referred to during the course of the argument in the earlier "Memorandum".

This lack of consistency on the part of the Government of the United States with regard to the treaty provisions which have allegedly been infringed hardly corroborates the claimant Government's contentions based on these provisions. In respect of the Court's jurisdiction, the Italian Government could request the Court to declare that the conditions set forth in Article XXVI of the Treaty have not been fulfilled, at least with reference to part of the claim. However, in the interests of a complete settlement of the present dispute, the defendant Government refrains from putting forward any such request.

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[1] *Right of Passage* case, *ICJ Reports 1957*, p. 149.

[2] Unnumbered document.

PART III

THE ADMISSIBILITY OF THE CLAIM

The Italian Government respectfully submits that the United States Government's claim is inadmissible in view of the fact that local remedies were not exhausted by the two United States corporations on behalf of which the claim is put forward.

In the well-known *Ambatielos* case, which concerned a claim made by the Greek Government against the United Kingdom Government on the basis of the bilateral Treaty of Commerce and Navigation of 1886, the United Kingdom Government invoked the local remedies rule and the Commission of Arbitration said:

> "The rule thus invoked by the United Kingdom Government is well established in international law. Nor is its existence contested by the Greek Government. It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals[1]."

The local remedies rule was authoritatively defined by the Court in the *Interhandel* case in the following terms:

> "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system[2]."

Italy was therefore entitled to have an opportunity to redress the alleged violations of the 1948 Treaty and the 1951 Supplementary Agreement within the framework of the Italian domestic system.

In applying the local remedies rule, it is necessary to assume that the contentions with regard to law and to fact, which have been put forward by the applicant Government on the merits of the case, are correct. In the words of the arbitral award in the *Finnish Shipowners* case:

> "According to the principles approved by the Arbitrator every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local

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[1] 12 *Reports of International Arbitral Awards*, pp. 118-119.

[2] *I.C.J. Reports 1959*, p. 27.

> remedies rule have been investigated and adjudicated upon by the highest competent municipal court . . . The contentions to be taken into account must be considered well founded because otherwise the rule that where recourse is futile recourse is not required would lead to the consequence, pointed out by the British Government, that unmeritorious international claims would be taken out of the rule that municipal remedies must be exhausted. But, as previously said, every relevant contention brought forward by the claimant Government in the international procedure — whether erroneous or not — must, according to the opinion expressed by the Arbitrator, under the local remedies rule have been examined by the municipal courts, ere the respondent State is bound to enter into further international proceedings[1]."

The same approach was taken by the Commission of Arbitration in the *Ambatielos* case:

> "If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule? As the arbitrator ruled in the *Finnish Vessels* case of 9 May 1934, the only possible test is to assume the truth of the fact on which the claimant State bases its claim[2]."

The two United States corporations on behalf of which the claim is put forward never made use of any local remedy. The applicant Government contends that no suit for damages "could . . . have been brought under Italian law, on behalf of ELSI's shareholders, Raytheon and Machlett"[3]. However, the only support given to this assertion is a corresponding paragraph in an affidavit by Mr Giuseppe Bisconti, Raytheon's Counsel ("Ann. 26, para. 28", to the Memorial).

In the present case no provision of the Treaty or the Supplementary Agreement was ever invoked before Italian courts. There is no doubt that the two US corporations could have done so. Enabling legislation had been enacted in Italy: Law No. 385 of 18 June 1949 (*Gazzetta Ufficiale*, No. 157 of 12 July 1949, supplement) and Law No. 910 of 1 August 1960 (*Gazzetta Ufficiale*, No. 213 of 1 September 1960), the latter with regard to the 1951 Supplementary Agreement Provisions of the Treaty had been regarded by the Italian Court of Cassation as self-executing and applied to the benefit of United States parties which invoked them. See, for instance, decision No. 2228 of 30 July 1960, *The Durst Manufactur-*

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[1] *Reports of International Arbitral Awards*, pp. 1503-1504.

[2] 12 *Reports of International Arbitral Awards*, p. 119. In the *van Oosterwijck* case the European Court of Human Rights similarly held:

> "The only remedies which Article 26 of the Convention requires to be exercised are those that relate to the breaches alleged and at the same time are available and sufficient (see the Beweer judgment of 27 February 1980, *Series A, No. 35*, p. 16, § 29). In order to determine whether a remedy satisfies these various conditions and is on that account to be regarded as likely to provide redress for the complaints of the persons concerned, the Court does not have to assess whether the complaints are well-founded: it must assume this to be so, but on a strictly provisional basis and purely as a working hypothesis (see the arbitration award of 9 May 1934 in matter of the 'Finnish Ships', *United Nations Collection of Arbitration Awards*, Vol. III, pp. 1503-1504, also cited by the Commission in its decision of 17 January 1963 on the admissibility of application No. 1661/62, *X and Y v. Belgium*, *Yearbook of the Convention*, Vol. 6, p. 366)." *Publications of the European Court of Human Rights*, Series A, Vol. 40, pp. 13-14 (1981).

[3] Memorial, I, p. 65, n. 3.

ing Co. v. *Banca Commerciale Italiana*, with reference to Article V, paragraph 4, of the Treaty[1].

In the Italian Government's view, the fact that the two United States corporations never resorted to Italian courts, when they could have based a claim against the Italian State on the alleged facts and on the alleged infringements of the Treaty and the Supplementary Agreement, leads to the conclusion that the applicant Government's claim is inadmissible because local remedies were not exhausted.

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[1] 64 *Rivista di Diritto Internazionale* (1961), pp. 117-118 and 84 *Il Foro Italiano* (1961), I-304. A similar view appears to have been taken by United States courts. In *Spiess* v. *Itoh & Company* the US Court of Appeals for the Fifth Circuit held that "(t)he FCN treaties, including the Japanese Treaty, are self-executing treaties, that is they are binding domestic law of their own accord, without the need for implementing legislation". 643 *Federal Reporter*, 2d Series, pp. 353 ff., at p. 356 (1961).

PART IV

THE INTERPRETATION AND APPLICATION OF THE 1948 TREATY AND THE 1951 SUPPLEMENTARY AGREEMENT

1. The legal terms of the dispute: the claimant and the defendant Governments' positions. — The Government of the United States, at the beginning of its Memorial of 15 May 1987, asserts that the case

> "concerns the failure of the Government of Italy to afford to United States investors in Italy the protections and guarantees established by the 1948 Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (the 'Treaty') and its 1951 Supplement[1]".

This claim is subsequently developed with reference, in particular, to Articles III, V and VII of the 1948 Treaty, and to Article I of the 1951 Supplementary Agreement. More precisely, the Government of the United States claims that

> "the requisition and subsequent conduct were both arbitrary and discriminatory, prevented Raytheon and Machlett from managing and controlling an Italian corporation whose shares they had lawfully acquired, and resulted in the impairment of their legally acquired rights and interests — in violation of Articles III and VII of the Treaty and Article I of the Supplement. In addition, the requisition constituted a taking of Raytheon's and Machlett's interests in property without due process and without adequate compensation, in violation of Article V of the Treaty. Italian authorities also failed to comply with the obligation under Article V to afford the protection and security, by the unwarranted delay in ruling on the challenge to the requisition order and by failing to afford protection to ELSI's plant and premises[2]."

On the contrary, the Italian Government considers the charges concerning the behaviour of the Italian authorities to be unfounded, because they are based not only on an inaccurate and biased reconstruction of the facts (as has been clarified in Part I), but also on an incorrect interpretation of international law. It will be shown how the provisions on which the United States Government's claim is based should be properly understood and applied to the case in question. Before doing so, however, a few considerations need to be made concerning the nature, content and general features of the two Treaties that the United States Government claims have been violated by Italy.

2. The rules on interpretation to be applied with reference to the 1948 and 1951 Treaties between the United States and Italy. — Although the 1969 Vienna Convention on the Law of Treaties does not apply to the interpretation of the Treaty and its Supplementary Agreement, the rules on interpretation included in the Convention are to be considered as corresponding to those applicable under general international law. As the Inter-American Court of Human Rights stated in its Advisory Opinion OC-3/83: ". . . the rules of interpretation set out in the Vienna Convention . . . may be deemed to state the relevant international law

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[1] Memorial, I, p. 43.
[2] *Ibid.*, pp. 43-44.

principles applicable to this subject"[1]. Similarly, the Arbitration Tribunal in the dispute concerning the *Delimitation of the Maritime Boundary* between Guinea and Guinea-Bissau considered that Articles 31 and 32 of the Vienna Convention provided the "relevant rules of international law governing the interpretation" of an 1886 treaty. The Tribunal referred to the "Parties' agreement on this point" and to

> "the practice of international tribunals concerning the applicability of the provisions of the Convention on the Law of Treaties by virtue of an international custom recognized by States (see in particular the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *I.C.J. Reports 1971*, p. 47, para. 94; *Fisheries Jurisdiction* case, *I.C.J. Reports 1973*, pp. 18 and 63, para. 36)[2]".

It should be noted that, in accordance with the general rules of interpretation set out in Article 31 of the above Convention "[a] treaty shall be interpreted in good faith, in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose*"[3]. This provision is expressed in such terms as to allow one to conclude that, out of the various possible methods of interpretation, priority is given to the *textual method*. This method has the advantage of being objective, precisely because it is based on the normal, ordinary meaning of the words. The Convention gives less weight to the intention of the parties as it appears from the preparatory works. The value of these works, according to Article 32 of the Convention, depends on the results of the objective method[4].

Further elements which can be drawn from the above-mentioned Article 31 include the requirement that each clause of a Treaty shall be interpreted in its context, taking into account the aims pursued by the parties through the treaty as a whole. Both of the above indications strongly emphasize the unitary character of each treaty. Therefore, it is necessary to rule out the possibility of artificially combining individual clauses which may suit the specific and occasional interest of one interpreter in a particular case. Likewise, one must also refrain from representing, as the "object and purpose" of the whole treaty, an aim which is partial with respect to the overall aim of a treaty, and which, moreover, is not explicitly stated, but is, at most, pursued only indirectly in the treaty (in the present case, the protection of investments).

3. The Treaty of Friendship, Commerce and Navigation of 2 February 1948; its impact on the problem of investments. — The Treaty of Friendship, Commerce and Navigation signed in Rome on 2 February 1948 between the United States of America and Italy belongs to a well-known category of bilateral agreements governing the treatment of aliens. Agreements of this kind aim essentially at regulating the status of nationals of each Party, as well as of legal entities and

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[1] Advisory Opinion OC-3/83 of 8 September 1983, *Annual Report of the Inter-American Court of Human Rights 1984*, pp. 28-29.

[2] See translation published in 25 *International Legal Materials*, pp. 271-272 (1986). The original French text refers to "La pratique des tribunaux internationaux quant a l'applicabilité de dispositions de la convention sur le droit des traités au titre d'une coutume internationale reconnue entre Etats (...)". See 68 *Rivista di Diritto Internazionale*, p. 609 (1985).

[3] Emphasis added.

[4] However, the Italian Government finds it useful to complete the set of preparatory works (docs. Nos. 3 to 17) concerning the parliamentary debates relating to the 1948 Treaty and the 1951 Supplementary Agreement — as the claimant Government exhibited only part of the relevant documentation — both for Italy and the United States.

companies which have the "nationality" of one of the Parties, by assigning to them a number of advantages and guarantees in the other Party's territory.

One of the main features of these agreements is their broad scope, which is due to the great variety of objectives pursued. The matters regulated include, in the first instance, a wide range of questions referring to the establishment, in the territory of either Party, of nationals and legal entities belonging to the other Party, for the purpose of carrying on not only commercial and industrial activities, but also professional, cultural, scientific, religious or philanthropic activities. It should also be noted that the benefits granted to individuals and legal entities are not restricted to the recognition of rights with economic implications; also personal rights and even certain civil rights and freedoms are covered.

Within the framework of these agreements, the provisions governing establishment are followed by those concerning international trade and related problems of a fiscal, customs, and currency nature; a further set of provisions refers to navigation[1].

The Treaty of 2 February 1948 between Italy and the United States corresponds to the above model and is extremely complex. It lies beyond our present scope to go into its content in detail. We shall merely point out in passing that it is over 20 pages long and comprises 27 articles, many of which contain several paragraphs. The object and purpose of such a Treaty (in the light of which it must be interpreted, in accordance with Art. 31, para. 1, of the Vienna Convention on the Law of Treaties cited above) are given an appropriate overall description in the Preamble:

> "strengthening the bonds of peace and the traditional ties of friendship between the two Countries and [. . .] promoting closer intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of their peoples".

In consideration of all this, one cannot agree with the Government of the United States when it claims that "the parties' fundamental intention" was "to provide a framework which would foster a favorable climate for investment"[2]. In our view, the aim of creating legal conditions suitable for investment was only one of the numerous aims pursued in the 1948 Treaty[3]. It is useful to insist on this point, in order to oppose from the outset the tendency emerging from the Memorial of the claimant Government, namely, to interpret all the provisions of the 1948 Treaty as being intended to protect the investors of each Party in the territory of the other Party. This tendency does not conform to an objective interpretation of the said provisions. Furthermore, it would also have the result of greatly accentuating the imbalance between the two Parties in view of the overwhelming predominance of United States investments in Italy over Italian investments in the United States.

In this connection it should be noted that numerous other Treaties of Friendship, Commerce and Navigation concluded between the Government of the United States and Western European countries after the Second World War contain an explicit reference to the fostering of investment as one of the aims pursued. This applies to the Treaties with Greece, of 3 August 1951, with Denmark, of 1 October 1951, with West Germany, of 29 October 1954, with the Netherlands, of 22 March 1956, with Belgium, of 21 February 1961, and with Luxembourg, of 23 February 1962. The expression most frequently used refers to the possible contribution to the development of closer economic and cultural relations "by arrangements . . . promoting mutually advantageous commercial intercourse and investments". It is noteworthy that wording of this kind was not included in the Preamble to the Treaty signed by the United States and Italy on 2 February 1948.

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[1] In general, Blumenwitz, "Treaties of Friendship, Commerce and Navigation", in *Encyclopaedia of Public International Law*, Inst. 7, 1984, pp. 484 ff.

[2] Memorial, I, p. 69.

[3] In this regard, Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present U.S. Practice", in *American Journal of Comparative Law*, 1956, p. 239, says that "the FNC Treaty is not a special-interest vehicle, but rather one into which investor requirements, with scarcely an express reference to investments, are fitted as integral parts for a larger regulation of private affairs in international relations".

Our remarks concerning the object and purpose of the 1948 Treaty are indirectly confirmed by the subsequent signing of the Supplementary Agreement (Washington, 26 September 1951). As can be seen from its Preamble, this Agreement actually aims at "giving added encouragement to investments of the one country in useful undertakings in the other country"; the contribution it makes to this end consists in the "amplification of the principles of equitable treatment set forth in the Treaty of Friendship, Commerce and Navigation signed at Rome on 2 February 1948". Clearly, there would have been no need to negotiate and sign a supplementary agreement had the preceding fundamental Treaty given sufficient weight to the specific problems of investment.

4. Recent tendencies of the United States policy for the protection of foreign investments. — A significant development needs to be recalled here. In recent years, particularly since 1982, United States policy, which had previously tended to encourage the stipulation of further Treaties of Friendship, Commerce and Navigation (many of which were negotiated after the Second World War), underwent a change. Preference began to be given to a more limited, but more effective, instrument for regulating relations with countries with heavy United States investments, namely, bilateral Investment Treaties. This new type of agreement had already been tried out in the seventies with reference to relations between a number of European countries and several developing countries. The United States ultimately saw the merits of the new approach and followed it in the case of a number of countries (starting with Egypt and Panama). An attempt was made by the Investments Bureau of the State Department to draft a model investment treaty[1].

Two remarks need to be made in this connection. Firstly, the change in the United States' attitude and the reasons for such a change are indicative of the objective limitations of the suitability of Treaties of Friendship, Commerce and Navigation as a means for protecting investments. It has been rightly said that these Treaties were "intended to protect American citizens abroad, rather than private foreign investments"[2]. In our opinion, when doubts arise as to the scope of certain provisions contained in the 1948 Treaty between Italy and the United States, this factor should not be underrated. It should also be noted, again in connection with Treaties of Friendship, Commerce and Navigation, that "the attempt to address very complex issues in the context of a broad spectrum of relations detracted from the utility of the FCN (Treaties) as an investment protection device"[3].

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[1] Blumenwitz, *op. cit.*, p. 489, mentions a "declining relevance" of the Treaties of Friendship, Commerce and Navigation.

[2] Bergman, "Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty", *New York Journal of International Law and Politics*, 1982, p. 7.

[3] Bergman, *op. cit., loc. cit.*

This accurate remark can hardly be reconciled with the attempt by the claimant Government to make out that Treaties of Friendship, Commerce and Navigation are basically the equivalent of investment treaties[1].

Secondly, the differences between the two types of agreement we are comparing must necessarily have repercussions on their interpretation. From the point of view of the Government of the United States, each of the provisions in the 1948 Treaty to which it refers is merely a part of a complex regulatory design aimed at protecting investments. This view must be challenged. The approach chosen by the claimant Government distorts the global nature of the Treaty.

5. The principles on which the 1948 Treaty is based. — One of the fundamental characteristics of the 1948 Treaty, which is rightly emphasized in its Preamble, is the fact that it is "based in general upon the principles of national and of most-favored-nation treatment in the unconditional form". Perusal of the individual provisions of the Treaty reveals that the two standards are both referred to in some articles (e.g., Art. I, paras. 2 and 3), while reference to only one standard is made in others (e.g., Art. IV, which merely provides for the most-favoured-nation treatment in the case of exploitation of mineral resources).

When the Treaty was signed, the liberal spirit with which the principle of national treatment had been adopted was hailed by a distinguished member of the United States administration. During the hearing of 30 April 1948 before a subcommittee of the Committee on Foreign Relations of the US Senate, Mr. Thomas Blaisdell, assistant to the Secretary of Commerce for International Trade, made the following declaration:

> "The Treaty represents acceptance by republican Italy of a number of democratic principles in trade and navigation. The national treatment accorded to corporations, for example, is the most liberal ever specified in any treaty entered into by the United States[2]."

Clearly, both the national treatment and the most-favoured-nation standards take on a concrete and precise meaning through the ascertainment respectively of the conditions applying to the citizens (and thus of the municipal legislation governing them) and of those applying to third countries and their citizens (under the agreements concluded with those countries) with regard to a given matter. Therefore both clauses have been called "relative"[3]. Everything depends on the point of view adopted in a single case, that of one or other of the contracting States, and on the type of treatment referred to. In this connection it should be noted that, when speaking of "treatment" one cannot take into account only the advantages that are implied; in all matters, the overall treatment of aliens is an inseparable whole made up of advantages and disadvantages. If one considers, in particular, the concept of "national treatment" on the basis of this standard, one cannot avoid recognizing that an alien possesses certain rights and related obligations which are commensurate with the rights and obligations pertaining to the local State's nationals in the matter in question. Although the most-favoured-nation treatment implies the more favourable treatment between those enjoyed and enjoyable by a third Country (or by one of its nationals) it is necessary to compare the several legal systems *in their entirety* even for the purpose of assessing the applicable treatment.

6. The formula "in conformity with the laws and regulations in force" in the 1948 Treaty. — Analysis of the 1948 Treaty also shows that, in regulating a given

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[1] Memorial, I, pp. 69-70, notes.

[2] See doc. 15.

[3] Bergman, *op. cit.*, p. 20.

matter, the principle of national treatment, or that of the most-favoured nation, is often accompanied by a specific provision according to which the enjoyment or the exercise of rights by citizens of each Party are ensured "in conformity with the applicable laws and regulations". When such a clause is included in the text of a provision granting national treatment, it reinforces the concept defined above according to which foreigners do enjoy rights but are also bound to respect the duties imposed on the citizens by the laws of the country. In other words, the respect of the set of local laws and regulations is a limit that cannot be overstepped by virtue of a condition granted to foreigners "protected" by a Treaty of Friendship, Commerce and Navigation.

This appears quite reasonable and corresponds to a situation in which the alien benefiting from national treatment finds himself quite apart from the specification of conformity with the applicable laws and regulations. A foreigner cannot be considered to have a privileged position vis-à-vis a citizen of the local State when the national-treatment principle is applied. When the above-mentioned specification is contained in a provision which grants the most-favoured-nation treatment, the limitation set on the treatment of the foreigner consists in not granting him the favourable condition ensured to the citizens of a third country, should this not be compatible with the municipal legislation or regulations[1].

With regard to the principles laid down in the 1948 Treaty, it must be observed that the claimant Government makes occasional references to a notion of fair treatment, to which the status of an autonomous principle seems to be attributed. In fact, it is in the Preamble to the 1951 Supplementary Agreement that the "principles" (and not the principle) of "equitable treatment" stated in the 1948 Treaty are mentioned, and it is asserted that their amplification should contribute to encouraging investments further. But when Articles I to XIII of the 1948 Treaty, that is, the only clauses dealing with establishment and the only ones partially applicable also to questions of investments, are examined thoroughly, the only principles repeatedly used appear to be those of national treatment and of most-favoured-nation treatment. The fact is that *no fair-treatment principle is actually stated* in the 1948 Treaty.

This becomes all the more significant in view of the fact that an obligation to ensure "equitable treatment" (to the persons, property, enterprises and other interests of nationals and companies of the other Party) is laid down explicitly in the Treaties of Friendship, Commerce and Navigation entered into by the United States with Ireland, Denmark, Greece, Belgium and Luxembourg. Some other Treaties, particularly those concluded with Germany and the Netherlands, speak of "fair and equitable treatment" to be accorded by the Parties to the above-mentioned beneficiaries.

Therefore, the reference to the "principles of equitable treatment" contained in the Preamble to the 1951 Supplementary Agreement can only mean that the Parties thereto wished to express their intention to go beyond the two principles contained in the basic 1948 Treaty, the value and function of which have been expressed in the "equitable treatment" formula. In other words, the principles of national and of most-favoured-nation treatment are both considered to be "principles of equitable treatment". However, there is no separate fair treatment principle to which the other two are added. At most it may be claimed that Article I of the Supplementary Agreement implicitly grants equitable treatment to its beneficiaries in so far as it forbids subjecting the citizens and legal entities of either Party to arbitrary and discriminatory measures within the territory of the other Party.

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[1] According to an author quoted in the US Government Memorial (**I**, p. 72, n. 1) whose opinion seems therefore to be shared by the claimant Government, the phrase "in conformity with applicable laws and regulations" as it occurs in this Treaty, is framed in such a manner as to imply that it does not constitute a reservation detracting from the Treaty right (Walker, "Provision on Companies in United States Commercial Treaties", in *American Journal of International Law*, 1956, p. 784, n. 53). The above-mentioned phrase is not altogether clear. In our opinion the question is not that of the detraction of something from a Treaty right. What happens is simply that the Treaty acknowledges some rights only to the extent to which they are in conformity with the laws and regulations of the local State.

7. The Status of corporations, in the same Treaty (Art. II, para. 2). — Another general problem solved by the 1948 Treaty, and the solution of which of course retains its validity in relation to the 1951 Supplementary Agreement, is that of the status of legal entities. It is a well-known fact that, in all treaties of friendship, commerce and navigation, the category of persons who are entitled to benefit from the protection provided by every treaty consists, in the first instance, of individuals who are nationals of either party to the agreement. These individuals are protected in so far as they are present or carry on activities within the territory of the Party other than the one of which they are citizens. A second category consists of legal entities; with regard to the latter each Treaty establishes the criteria according to which they are said to belong to one or other of the Parties to the agreement, and consequently recognizes the right of legal entities belonging to one State to enjoy the advantages granted under the Treaty within the territory of the other State.

Article II, paragraph 1, of the Treaty signed between Italy and the United States on 2 February 1948 gives a broad definition of the term "corporations and associations". In particular, it includes among the latter all "corporations, companies, partnerships and other associations, whether or not with limited liability and whether or not for pecuniary profit, which may have been or may hereafter be created under the applicable laws and regulations". Paragraph 2 goes on to lay down that

> "[c]orporations and associations created or organized under the applicable laws and regulations within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High Contracting Party and shall have their juridical status recognized within the territories of the other High Contracting Party whether or not they have a permanent establishment, branch or agency therein".

In order to belong to either Party, according to Article II, paragraph 2, of the 1948 Treaty, what is therefore required is that the creation (or organization) of a legal entity takes place in accordance with the applicable legislation in the respective territories. The Treaty has adopted the criterion of nationality (if one intends to use this term) which is based on the place of origin of each legal entity.

There is no provision either in the Treaty or in its Supplementary Agreement to the effect that a High Contracting Party may claim that a corporation which was not "created or organized under the applicable laws and regulations" within its territory is nevertheless a company of the same Party. As was stated in the brief for the United States as *amicus curiae* in *Sumitomo* v. *Avigliano* with regard to the similar wording of the Treaty of Friendship and Commerce between the United States and Japan, the Treaty "provision makes clear that a company has the nationality of its place of incorporation"[1]. The brief ran as follows:

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[1] 21 *International Legal Materials*, p. 630 (1982).

> "The simple place-of-incorporation standard in the FCN treaties was a deliberate departure from other tests of corporate nationality — including a control test of the sort adopted by the court of appeals — that were followed or suggested in other situations during the preceding several decades (Walker, *supra*, 50 *American Journal of International Law* at 381). Moreover, the intent of the Parties that a company's nationality would not be determined by the nationality of its owners is reinforced by other provisions of the treaty that distinguish between nationals and companies of a Party and enterprises owned or controlled by such nationals and companies[1]."

This argument was accepted by the Supreme Court of the United States, which applied it to the case in hand in the following terms:

> "Sumitomo is 'constituted under the applicable laws and regulations' of New York; based on Article XXII, paragraph 3, it is a company of the United States, not a company of Japan. As a company of the United States operating in the United States, under the literal language of Article XXII, paragraph 3, of the treaty, Sumitomo cannot invoke the rights provided in Article VIII, paragraph 1, which are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan[2]."

From the above-mentioned Article II, paragraph 2, in the case in hand it may be inferred that Raytheon and Machlett, which are companies of the United States, are beneficiaries of the protection afforded under the Treaty with regard to their activities in Italy (or, more in general, to the situations having arisen in Italy and which concern them directly), while ELSI, which without any doubt is a company of Italy, is not included among the beneficiaries of protection under the Treaty with regard to its activities in Italy, or in situations relating to them which have occurred in Italy (e.g., the requisition of its plant, the result of a decree which was addressed to ELSI).

8. Provisions of the Treaty protecting activities and goods which formally belong to persons of the local State. — As a general rule the Treaty and the Supplementary Agreement protect the physical persons and legal entities of one Contracting State solely as far as activities carried on and property *directly* held in the other Contracting State are concerned. However, there are a few provisions which, as well as according protection to such activities and property, also provide protection for certain property that, although formally belonging to a physical person or legal entity of the local State, are *substantially* activities and property belonging to persons of the other State. For example, Article V, paragraph 3, of the Treaty, after granting the nationals, corporations and associations of one Contracting party both national and the most-favoured-nation treatments within the territory of the other Contracting State for the purposes of the matters enumerated in paragraphs 1 and 2 of the same Article, makes the following further provision:

> "Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public

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[1] *Ibidem*, at p. 634.

[2] 102 *Supreme Court Reporter* 2374 (1982); 21 *International Legal Materials*, p. 791 et seq., p. 794 (1982). Art. XXII, para. 3, of the Treaty between the United States and Japan, which corresponds to Art. II, para. 2, of the Treaty with Italy, reads as follows: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof." Art. VIII, para. 1, confers rights on "nationals and companies of either party . . . within the territories of the other Party".

> control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest, shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest, and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest."

The structures of Article III, paragraph 1, second sentence, and Article III, paragraph 2, second sentence, are quite similar.

The existence of the above-mentioned provisions can be explained by recalling that there are frequent cases in present-day economic life of companies set up in one country and in accordance with its laws expanding their activities to other countries, different from that of their origin, by means of other companies controlled by them. The latter can be set up by the "parent" company, or companies may become "parent" companies by buying up the majority of the foreign company's shares (this occurred in the case of Raytheon and ELSI).

Legally, it must be observed that, in any case, the controlling and the controlled company remain two distinct entities, that is, two subjects which can, and in the present case actually do, have different nationalities.

The phenomenon described as the subordination of one company to another may lead to various consequences in treaties of friendship, commerce and navigation. Theoretically, the Contracting States could solve the question of the nationality of a controlled company by means of a clause in which the latter is deemed to belong to the national State of the controlling company (or "parent" company). However, this type of solution is not envisaged in the 1948 Treaty between Italy and the United States. It was decided instead to make the nationality depend on the State of origin and to include *ad hoc* provisions in order to give a certain limited importance to the fact of the control being exerted by a company belonging to the other contracting State. However, this has three consequences, about which there seems to be no doubt: *first*, the controlled company retains its nationality, in accordance with Article II, and this must be taken into account when applying all the provisions of the Treaty which do not have the special nature of the above-mentioned provisions contained in Articles III and V; *second*, the link between parent company and controlled company, which certainly exists at the level of economic interests, does not allow of any identification between the two when it comes to interpreting the Treaty; *third*, the above-mentioned provisions must be given a restrictive interpretation because any exceptional rule must be interpreted narrowly; it is therefore not possible to expect that the phenomenon of control by a foreign company over a national company has any impact beyond the situations provided for specifically in Articles III and V.

9. Alleged violations of Article V of the 1948 Treaty. — Let us examine the individual provisions of the 1948 Treaty and the 1951 Supplementary Agreement on which the United States has based its claim. It will be shown that, in the first place, Articles V and VII of the Treaty are almost entirely irrelevant to the case in hand, and, in the second place, Article III of the Treaty, and Article I of the Supplementary Agreement, when interpreted correctly, do not support the contentions of the claimant Government.

Article V concerns the "protection and security" of the persons and property belonging to nationals of each Contracting Party within the territory of the other Party. Paragraph 1 makes it clear that the term "nationals" is to be understood as including corporations and associations in so far as the provision set out in the same paragraph is "applicable in relation to property". Paragraph 2, which deals with a particular aspect of the protection and security of property, lays down that

> "[t]he property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation".

The same provisions give those receiving such compensation the right to withdraw it "without interference", with entitlement to foreign currency and with exemption from any tax for transfer or remittance. Lastly, paragraph 3 ensures that treatment no less favourable than national or most-favoured-nation treatment will be extended to enterprises in which nationals and corporations of each Contracting Party have a substantial interest whenever, within the territories of the other Contracting Party, the enterprise is transferred from private to public ownership or the enterprise is transferred to public control.

The Government of the United States contends that Article V, paragraph 2, was violated by the Italian Government when it requisitioned the ELSI plant. In its opinion, the "guarantee of compensation" is extended by the Protocol attached to the Treaty "to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party" ("in other words", it is claimed at **(I)**, p. 89, of the Memorial submitted by the Government of the United States, "the treaty unambiguously protects the investment interest of United States shareholders in Italian companies whose property is taken by the Italian Government"). Lastly, Article V, paragraph 1, is alleged to have been violated because the Italian Government supposedly did not protect the ELSI plant after the requisition; furthermore, paragraphs 1 and 3 of the same Article are deemed to have been violated at the same time owing to the delay with which the Prefect decided on the appeal against the requisition.

Let us begin from the last two points. The preliminary remark to be made on the claimant Government's contention is that the problem of the protection of the ELSI plant, as well as that of the delayed decision by the Prefect, do not directly concern the United States companies, which the Government of the United States seeks to protect. Article V, paragraphs 1 and 3, guarantees the protection and security of property belonging to United States companies in Italy, while the plant that according to the Government of the United States should have been protected under the Treaty belonged to the *Italian* company ELSI. Moreover, also, the Prefect's decision on the appeal against the requisition, together with the Mayor's decree were actually addressed to ELSI. The statement expressed on **(I)** page 89 of the Memorial submitted by the United States Government, according to which assets were "owned through ELSI" by Raytheon and Machlett is totally unacceptable[1].

In addition to this preliminary observation, a number of facts can also be challenged. In Part I of the present Counter-Memorial it was clarified that the occupation of the ELSI plant by the employees began before the requisition, and not after it, as the claimant Government would have it, and that the attitude of the workers entailed no risk for the plant after the decree issued by the Mayor of Palermo, especially as the Mayor had appointed two representatives to ensure that the orders issued with a view to the management of the factory were respected. Adequate clarifications have been given with regard to the causes and effects of the delay with which the Prefect decided upon the appeal. In any case it must absolutely be ruled out that this delay has any connection with the alleged violation of paragraphs 1 and 3 of Article V.

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[1] Memorial, **I**, p. 89.

10. . . . and of the Protocol annexed to the Treaty. — With regard to the alleged violation of Article V, paragraph 2, it must be pointed out that this provision accords, in the local State, protection against the taking of property and provides for compensation to be paid for property belonging to nationals, corporations or associations of the other Contracting Party. It is true that paragraph 1 of the Protocol specifies that this protection is afforded also to "interests held directly or indirectiy by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party". However, this does not mean that the same protection is to be generally granted as for property belonging to nationals of the other Contracting Party also to property pertaining to a company which belongs, under the terms of the Treaty, to the local State and is controlled by a company belonging to the other State. Only exceptionally are some Treaty provisions intended to this effect (*supra*, para. 8) and a different language is used.

Furthermore, under paragraph 1 of the Protocol protection is accorded only to rights to property. While the Italian text refers only to "rights" (*diritti*) the term used in the English text is "interests". According to Article 33, paragraph 4, of the Vienna Convention on the Law of Treaties, the provisions drawn up in two equally authentic languages are to be interpreted in such a way as to reconcile the meaning of the two texts and therefore, in this case, in the more restrictive sense of the Italian text.

A further observation, which is decisive in itself, amounts to denying the applicability of both the Protocol and Article V, paragraph 2, in the present case, for the simple reason that no expropriation or "taking of property" occurred. A temporary requisition decree was issued with the effect of blocking the availability of the ELSI plant for six months and therefore of partially suspending the company's management functions, but only as far as that particular plant was concerned. On the other hand, the Commune of Palermo gained nothing at the company's expense. Thus, it must be ruled out completely that the requisition decreed by the Mayor of Palermo can be considered an expropriation measure. The Italian text expressly refers to expropriated property (*beni espropriati*). In fact, Article V of the Treaty covers completely different situations from that which actually occurred[1].

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[1] In n. 3 at I, p. 90, the United States Government's Memorial quotes a number of awards delivered by the Iran-United States Claims Tribunal during the years 1981-1986 and tries to demonstrate that interference with an alien's property may amount to expropriation, even though the local State denies to have adopted such a measure, and notwithstanding the fact that the legal title to the property formally remains with the owner, the essential condition being that the foreign investor "has no reasonable prospect of regaining management and control". The application of this doctrine to our case depends on the assumption that "the Government of Italy physicaliy seized ELSI's property with the object and effect of ending Raytheon and Machlett's management and control, in order to prevent them from conducting the planned liquidation". Furthermore, according to the alleged indications of "Italian officials" the requisition was going to be extended beyond its six-months term, while IRI was completing its arrangements for acquiring ELSI's assets: that is why Raytheon and Machlett had no reasonable prospect of ever recovering management and control of ELSI. Whatever the merits of the claimant Government's contentions in law, the assumption mentioned above is firmly denied by the Italian Government: ELSI's property was partially requisitioned for the reasons stated in Part I of this counter-memorial, with no intention of *ending Raytheon* and Machlett management and control. Their end was actually the result of the bankruptcy proceedings, opened at the request of the ELSI management.

11. Interpretation and application of Article VII of the Treaty. — We shall now examine the problems raised by the interpretation and application of Article VII of the 1948 Treaty. In paragraph 1, which seems to be the one to have mainly attracted the attention of the United States Government, this Article accords to the nationals, corporations and associations of each Contracting Party, the right to "acquire, own and dispose of" immovable property or interests therein within the territories of the other Contracting Party; for corporations of United States nationality the conditions are commensurate with the treatment accorded to Italian corporations in the United States state of origin, and in any case do not imply more extensive rights than those granted to legal persons in Italy. The fact that this provision includes a principle of the free availability of immovable property is interpreted by the Government of the United States in the sense that the Italian Government should have been under an obligation to respect the decisions of the ELSI management concerning the voluntary liquidation of the company and should not have requisitioned the ELSI plant, since the requisition allegedly prevented "the owners" from disposing of the plant; in any case, the requisition should have been followed by the payment of compensation.

Once again the first objection is that the plant belonged to ELSI, that is to an Italian company. The above-mentioned Article VII, applied to the situation to which the dispute relates, could only ensure the free availability to Raytheon and Machlett of the ELSI shares which belonged to them (an availability about which nobody has cast any doubts). Supposing the two United States companies were truly the owners of the plant requisitioned the decree of the Mayor of Palermo would not have had any effect since it was addressed to ELSI.

There are, moreover, other objections to be made. It is hard to see how the respect of a company's decision concerning its own liquidation can be confused with the only rights which unquestionably pertained to Raytheon and Machlett: their rights as shareholders of ELSI. It is hard to see how, in order to leave a company free to implement its own voluntary winding up, the Italian authorities should have refrained from requisitioning its plant: without doubt, such an argument would be inconceivable with reference to an Italian company, since a requisition decree referring to certain company property can legitimately be enforced even if the company is being wound up. In this connection it is worth pointing out that the above-mentioned Article VII, paragraph 1, explicitly excludes the possibility of United States companies having more extensive rights than those accorded by the Italian legislation to national companies in Italy. Lastly, it is worth repeating what has already been noted with regard to the requisition, that is, that it only temporarily blocked the availability of part of the ELSI property. Compensation was not eventually paid simply because it was replaced by the damages paid to the requisitioned party[1], as was explained in Part I.

12. Evaluation of the problems raised by Article III of the Treaty. — The provisions of the 1948 Treaty and the 1951 Supplementary Agreement on which the Government of the United States seems mainly to have based its case are Article III of the Treaty and Article I of the Supplementary Agreement. Attention will now be addressed to these provisions.

The content of Article III is rather complex. The first paragraph begins by guaranteeing that the nationals, corporations and associations of each Contracting State will have "rights and privileges with respect to the organization of and participation in corporations and associations" within the territory of the other Contracting State, in accordance with the applicable laws and regulations of the local State and benefiting from the most-favoured-nation treatment. In the case in point nobody has challenged the right of Raytheon and Machlett to have a right of participation in the Italian company ELSI. There is no disagreement on this between the Parties in the present proceedings. Article III, paragraph 1, then goes on to acknowledge that the corporations and associations of each Contracting Party in which nationals, corporations and associations of the other Party participate and which are controlled by the latter subjects, "shall be permitted to exercise the functions for which they are created or organized in conformity with the applicable laws and regulations", enjoying the most-favoured-nation treatment.

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[1] In this explicit sense see Court of Appeal of Palermo, Memorial, Ann. 72.

The claimant Government contends that the first sentence of paragraph 2 of Article III has been violated. This provision ensures the right of nationals, corporations and associations of each Contracting Party to "organize, control and manage" corporations and associations of the other Contracting Party" in conformity with the applicable laws and regulations" within the territories of the latter Party. According to the Government of the United States the provision summarized above gives the United States shareholders in a position to control an Italian company "a guarantee of non-interference with management and control"[1]. Furthermore, the Italian Government is accused of having exerted undue influence on the management through the requisition decree.

Both these contentions have to be challenged. In the first place, the requisition decree in no way affected control by the shareholders over the company. It merely concerned the management by the company of some property belonging to the said company. The right to control and manage certain "local" companies is not subject to unlimited guarantee, as the powers granted by law to the local authorities are thereby unaffected.

More exactly, with reference to the case in hand, it should be noted that there can be no violation of the Treaty in the case of a requisition decree based on a Law (Law No. 2248 of 20 March 1865, Ann. E, Art. 7, previously cited in Part I). This represents the logical consequence of the principle of "conformity with the applicable laws and regulations", which is explicitly asserted in Article III, paragraph 2. The possibility of requisitioning private property "because of grave public necessity" is, in fact, one of the cases provided for in Italian legislation concerning the unavailability of a plant for reasons of public interest. Moreover, it should not be overlooked that the Mayor's decree had the effect of determining only *temporary* unavailability of the ELSI plant.

Moreover, the fact that the requisition decree issued in the case in point was subsequently declared to be invalid does not transform it into a manifestation of undue interference by the Italian authorities. Until it expires or is overruled, a decree is to be considered legitimate and effective. In this connection, it should be recalled that the Prefect acknowledged it as a point of law that was

> "undisputed, in case law and legal doctrine, that the Public Administration is empowered under the above-mentioned Article 7 to dispose of the private property whenever necessity exists to face a situation of actual and imminent danger for the public interest (public health, public order, etc.) . . .".

The Prefect likewise acknowledged the Mayor's power to issue requisition decrees on his own initiative.

One point which deserves special attention is related to the nature of the consequences of the requisition decree. It in no way transferred the ownership of the ELSI plant to the Commune of Palermo. It only partially suspended the exercise of control and management by the company, with reference to the requisitioned property alone. In fact, by 1 April 1968, the ELSI Board of Directors had already decided in complete freedom to cease production and to liquidate the assets. Furthermore, after the requisition, the Company was able to take an extremely important decision for its future, namely, to file for bankruptcy. Only after this decision and because of it, did the ELSI management definitely lose control and management of the company assets.

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[1] Memorial, I, p. 72.

13. Article I of the 1951 Supplementary Agreement: was the requisition an "arbitrary" measure? — Let us now examine Article I of the 1951 Supplementary Agreement. It prohibits subjecting the nationals, corporations and associations of each Contracting Party, in the territories of the other Party, to "arbitrary or discriminatory measures" having, in particular, one of the following effects: "*(a)* preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein, or *(b)* impairing their other legally acquired rights or interests in such enterprises or in the investments which they have made" in various forms, including in particular the contribution of funds through loans or shares.

In the present case, the Government of the United States claims that the requisition of the ELSI plant decreed by the Mayor of Palermo represented an arbitrary and discriminatory measure such as to prevent the United States companies Raytheon and Machlett from maintaining the effective control and management of ELSI. Inasmuch as it is responsible for the requisition decree, the Italian Government is thus alleged to have violated the above-mentioned Article I of the 1951 Agreement.

The first objection to be raised to this contention is related to our previous remarks concerning Article V, paragraph 2, of the 1948 Treaty. In the present connection, it must be said again that the requisition decree was addressed to the Italian company ELSI; the United States companies Raytheon and Machlett were not actually subject to any measures affecting their property. It is also worth repeating that the above-mentioned two United States companies, which were shareholders of ELSI, never actually lost control or management of the company: the company organs, through which this control and management were performed, were able to function freely also during the period of the requisition, as they were merely deprived (for six months) of the availability of the plant. One may refer in this context to the decision to file for bankruptcy, already mentioned above, which was taken after the requisition.

There is a second objection, which would still be valid even on the assumption that the decree of the Mayor of Palermo directly affected Raytheon and Machlett: the requisition of the ELSI plant cannot be defined either as an arbitrary measure or as a discriminatory measure.

In general, an "arbitrary" measure is defined as a measure which is completely lacking in justification, and which can be explained only as a tool used by the public authorities to damage and oppress a private citizen. In most Treaties of Friendship, Commerce and Navigation entered into by the United States after the Second World War, a prohibition similar to the one contained in the above-mentioned Article I of the 1951 Supplementary Agreement is placed on any "unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals and companies of the other Party in the enterprises which they have established"[1]. Each Party is therefore prohibited from taking measures detrimental to the rights or interests of the citizens and companies of the other Party, whenever those measures can be defined as unreasonable; in other words, whenever no possibility exists of identifying an admissible reason on the basis of which public authorities have the power to limit those rights or interests.

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[1] See Art. V of the Treaty with Ireland (21 January 1950) and likewise Articles VIII of the Treaty with Greece (3 August 1951), V of the Treaty with the Federal Republic of Germany (29 October 1954), VII of the Treaty with the Netherlands (22 March 1956), IV of the Treaty with Belgium (21 February 1961), IV of the Treaty with Luxembourg (23 February 1962).

Indeed, the way in which the Government of the United States represents the requisition decreed by the Mayor of Palermo against the ELSI company appears similar to an act corresponding to the model of arbitrary or unreasonable measures described above: suffice it to mention that, on **(I)** page 80 of the Memorial submitted by the United States Government, it is claimed, among other things, that the purpose of the requisition was "to prevent Raytheon and Machlett from protecting their investment". But a perusal of the requisition decree issued on 1 April 1968 reveals that it was based on two undeniable facts: ELSI, having decided to close down its plant and dismiss about 1,000 of its employees, had created a serious social and economic problem, and the reactions by the employees and the trade unions, with the backing of public opinion, were such as to create fears of "disturbances of public order". In the light of these facts — the exact analysis of which has been carried out in the preceding pages containing a correct reconstruction of events (Part I) — the Mayor of Palermo was of the opinion that the "features of serious public necessity and urgency" required by law in order to proceed with a requisition actually existed. His decree can therefore in no way be said to be arbitrary.

The Memorial bases its argument on the decision of the Prefect of Palermo to set aside the Mayor's decree and merely quotes a passage taken from that decision in which the requisition is held to be "destitute of any juridical cause which may justify it or make it enforceable"[1]. The Prefect in fact stated: "Therefore, the order is destitute of any juridical cause which may justify it and make it enforceable[2]." However, this passage is only the conclusion of an argument, as can be seen from the following words:

> "There is no doubt that the goal to which the requisition was directed could not be actually achieved by the order, even though — in theory — in the case in point, the grounds of the grave public necessity and of the emergency and urgency which caused the issuance of the order may be held to be existing. This is proved by the fact that the activity of the company was neither resumed, neither might it be resumed."

In other words, the requisition decree was deemed illegitimate and set aside, certainly not because it was arbitrary — indeed, the Prefect acknowledged that, "in theory", the decree respected the conditions of necessity and urgency — but because the purpose of the resumption of activity by the company "could not be actually achieved" in this way. The Prefect's decision went on to criticize the Mayor for not having taken account of the fact that

> "the state of the company was such, for reasons of an economic and functional nature, as well as for market reasons, that its activity could be continued only after action by the management to solve the company's financial and industrial problems".

The decision to set aside the requisition decree therefore contained no statement that it was "arbitrary", as the claimant Government is attempting to make out in the present case. What was stated, essentially, is that the decree was not suitable for achieving its purpose of getting the ELSI plant to function. Therefore the requisition decree was cancelled because the concrete goal the Mayor was trying to achieve was unattainable (and he had therefore wrongfully exercised his powers). Clearly such a situation has nothing to do with an alleged "arbitrary measure" under the above-mentioned Article I of the 1951 Supplementary Agreement.

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[1] Memorial, **I**, p. 80

[2] See *ibid.*, Ann. 76, **I**, p. 362.

14. Was it "discriminatory"? — It is now necessary to ascertain whether the requisition in question was a "discriminatory" measure according to the terms of the same Article. By adopting the thesis that the requisition decree was aimed at giving IRI the time to expropriate the property of ELSI, the Government of the United States contends that it was: the purpose is alleged to be discriminatory in so far as it aimed at favouring a public enterprise controlled by the Italian Government[1].

This thesis, however, is not only groundless, but is also the result of an obvious misinterpretation of the concept of the discriminatory measure set out in Article I of the 1951 Supplementary Agreement.

It is possible to speak of discrimination only when two comparable situations are treated in different ways to the detriment of the interests of one of the parties concerned. Within the framework of a Treaty of Friendship, Commerce and Navigation which is essentially based on the standard of national treatment, the situations to be compared for the purpose of ascertaining whether the principle of the equality of treatment has been respected or not, are those of a foreign investor and of the corresponding national investor. In the case in hand, it would therefore be necessary to prove that Raytheon and Machlett, assuming that the requisition decree was addressed to them, had been discriminated against with respect to possible Italian investors. In other words, that the requisition concerned them *as United States companies*, while the Italian investors, if any, would not have suffered any damage. This must be ruled out entirely: not even the Government of the United States has ever claimed that the requisition in question was decided out of bias against United States companies. In fact, during the same years, requisition was frequently used with regard to plants belonging to companies, the majority shareholders of which were Italians (Part I, para. 9).

Furthermore, the fact that IRI is considered by the Government of the United States to be the beneficiary of the requisition is quite irrelevant. The claimant Government has contended that the alleged favours extended to IRI by the Italian Government were one aspect of the unfavourable treatment meted out to United States investors. But what is the logic behind this assumption of discrimination against the Raytheon and Machlett companies? With respect to what other subject in a similar situation were the two United States companies discriminated against? It should not be overlooked that, according to the highly imaginative presentation of the facts made by the Government of the United States, IRI is equated to the Italian Government, which is accused of having "discriminated" against the two United States companies.

With reference to what actually happened we shall limit ourselves to repeating what has been said above, namely, that at the time of the requisition IRI had no intention of taking the place of Raytheon and Machlett in controlling ELSI, not only in view of this company's extremely poor technical and economic conditions, but also, and more simply, because, according to IRI's industrial policy, it was not considered advisable to intervene on a larger scale in the sector of ELSI's activities. Besides, the purposes of the decree of the Mayor of Palermo were those stated in the text of the requisition order and nothing else.

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[1] Memorial, I, p. 80.

It remains to be seen whether the decisions related to the requisition of the ELSI plant resulted in damage to "other rights and interests" of Raytheon and Machlett or to investments made by them in the form of financial contributions, that is, loans or shares. In this connection it should be emphasized from the outset that, in order to speak of damage resulting from violation of Article I of the 1951 Supplementary Agreement, the basic assumption must always be that the requisition decree was arbitrary or discriminatory; and we consider we have already refuted such an assumption. We also wish to point out that the company subjected to the decree in question was an Italian and not a United States company; moreover, loans and shares were not directly affected. It is in any case important to recall that the interests of the Raytheon and Machlett companies, and the ultimate destiny of their investments, were jeopardized by events occurring prior to the requisition, for example, the proven incapacity of the ELSI management to make a profit, and its increasing insolvency, as well as by a subsequent fact, which was the consequence of the above-mentioned circumstances and in any case of the will of ELSI itself, namely, the declaration of bankruptcy. As has been amply illustrated in Part I, the requisition decree was in practice a parenthesis in the life of ELSI. The only damage caused by the decree was that of the temporary unavailability of a plant whose activities had already ceased without there being any intention of resuming them. Therefore the Italian Government completely rejects the accusation of having violated Article I of the 1951 Supplementary Agreement.

PART V

ISSUES RELATING TO THE CLAIM FOR REPARATION

1. Subsidiary nature of the comments concerning the United States claim for reparation. — In the preceding Parts of this Counter-Memorial the Italian Government has shown that the claim of the Government of the United States on behalf of Raytheon and Machlett is inadmissible and, on a subsidiary basis, that the alleged infringements of the Treaty and the Supplementary Agreement have not taken place. As the Government of the United States claims reparation on the basis of wrongful acts that have not occurred, it is not strictly necessary to deal in this Counter-Memorial with issues relating to reparation. However, on a further subsidiary basis, the Italian Government addresses some remarks on the claim for reparation in order to point out that even in this respect the claimant Government resorts to dubious contentions of law and to distortions of fact — all designed to maximize the amount of damages for which compensation is requested.

Given the entirely subsidiary character of the comments expressed in this Part, it seems appropriate to make only a few general remarks. However, the Italian Government expressly notes that the fact that some assertions by the claimant Government are not specifically contested by no means implies that the same assertions are recognized as accurate or supported by sufficient evidence. In fact, the claimant Government relies heavily on documents originating from ELSI or Raytheon or on affidavits of persons closely connected with Raytheon. The claim essentially rests on the book valuation of ELSI's assets, while no analysis is offered of experts' valuations which were given during the bankruptcy proceedings or of Raytheon's own pre-bankruptcy "quick-sale valuation"[1]. As was shown (see Part I, paras. 7 and 17), the book valuation in no way corresponded to the actual prospects of the sale of the assets.

Under the circumstances, the Italian Government notes that the claimant Government is far from having discharged its burden of proof also with regard to the alleged damages.

2. Links between the alleged violations of the Treaty and the alleged damages. — A claim for reparation may only be put forward for losses for which "in legal contemplation" the alleged acts were "the efficient and proximate cause and source from which they flowed"[2]. This characteristic of being the efficient and proximate cause must pertain to the alleged wrongful act or acts which is, or are, considered to have occurred. There must be a close connection between the infringement that has *ex hypothesi* occurred and the losses for which reparation is claimed[3].

In the claimant Government's Memorial the links existing between each alleged infringement of a Treaty provision and the alleged losses are not explored. For example, the applicant Government's contention that ELSI's bankruptcy was "the direct and foreseeable consequence of the requisition order"[4] is totally unacceptable. As was shown above (Part I, para. 11), bankruptcy was rather the consequence of ELSI's state of financial affairs and of Raytheon's declared unwillingness to make any further investments in its subsidiary. Nor could the delay in the Prefect's decision over the appeal be considered as a cause of the bankruptcy since ELSI's filing its application for bankruptcy came only seven days after the appeal (Part I, para. 14). Thus, even if the requisition decree and/or the delay in the decision over the appeal were taken to be infringements of Treaty provisions, no obligation to make good the alleged losses in the bankruptcy proceedings could be justified.

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[1] Memorial, I, pp. 106 ff.

[2] Thus the Administrative decision No. II given by the United States-Germany Mixed Claims Commission, 7 *Reports of International Arbitral Awards*, p. 30.

[3] Strictly speaking, the loss suffered by nationals cannot be identified with the loss suffered by the State as a consequence of the infringement of an obligation under international law. See Ago, *Scritti sulla responsabilità internazionale degli Stati*, II. 2 (1986), p. 981.

[4] Memorial, I, p. 107.

3. Considerations on the sums paid by Raytheon as a guarantor of ELSI's loans, or claimed by the United States in relation to Raytheon's credits towards ELSI. — The Government of the United States also seeks to recover sums that Raytheon had to pay in the bankruptcy proceedings because it had guaranteed some loans taken by ELSI. These guarantees were not an investment, but only a security covering 50 per cent of the loans which were given to ELSI by some Italian banks and which were otherwise unsecured. The banks lost 50 per cent of the money borrowed by ELSI. This money had contributed to ELSI's assets. By claiming the money which Raytheon later paid as guarantor for the other 50 per cent, the Government of the United States attempts to shift on to the Italian Government the loss of money which was borrowed and actually used by ELSI and never paid back to the lenders. It would be an extraordinary treaty provision indeed which would imply that the Italian Government should make good a financial loss of a United States company for money that had been freely used by that company's Italian subsidiary.

Substantial sums are claimed in relation to credits that Raytheon or other companies of the same group had towards ELSI. These sums do not necessarily correspond to investments. No claim had been made with regard to these credits in the bankruptcy proceedings[1]. Given the fact that all these credits exist towards companies all belonging to the same multinational group, their assessment would require particular care in evaluating the services actually rendered and the goods provided — both with regard to ELSI's need for these services and goods, and their prices in relation to fair-market prices.

4. The issue of the legal expenses incurred by Raytheon. — Legal expenses incurred by Raytheon can hardly find their "proximate cause" in the alleged infringement of a Treaty provision. "Legal and related expenses" incurred by Raytheon "in pursuing its claim against the Government of Italy for its actions against ELSI"[2] are at best part of the costs relating to the present proceedings. Most of the alleged legal expenses concerned lawsuits initiated by five Italian Banks — all independent entities, which are grossly misdescribed as "government banks acting pursuant to a government plan"[3] when they were only seeking to recover their financial losses over money borrowed by ELSI with a guarantee covering only 50 per cent of the sums[4]. These lawsuits are clearly unrelated to any alleged infringement of the Treaty. Even the claimant Government's contention that, had there been an "orderly" liquidation, the banks "would have

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[1] Cf. Memorial, Ann. 26, I, p. 239.

[2] *Ibid.*, p. 109.

[3] *Ibid.*

[4] The banks invoked Article 2362 of the Italian Civil Code and contended that, since Raytheon was in substance the sole stockholder of ELSI, the corporate veil should be lifted against the United States company. The acquisition of a small part of shares by Machlett appears to have been a device for avoiding the application of the said provision against Raytheon. Italian courts accepted Raytheon's argument that Machlett was in fact a separate entity, although fully owned by Raytheon.

settled their debts *(sic)* with ELSI"[1] is sheer speculation. Moreover, costs were awarded to Raytheon by Italian courts in the same litigations[2]: the awards cover normal legal expenses, including fees corresponding to lawyers' tariffs; any further legal expense possibly incurred by Raytheon cannot be considered to be reasonable under the circumstances.

5. The claim relating to interest. — With regard to interest the Italian Government recalls that in the *Lighthouses* case the Arbitral Tribunal stated as follows:

> "[. . .] no strict rules of law of a general character exist which prescribe or forbid the award of interest. The Arbitral Tribunal cannot accept the views expressed thereon by the two Agents, with opposing results. Also in this respect the solution largely depends on the character of each particular case[3]".

No interest was awarded by the Court in the *Corfu Channel* case. The Government of the United Kingdom had not claimed interest but the Court did not refer to this circumstance and said: "The Court considers the true measure of compensation in the present case to be the replacement cost of the *Saumarez* at time of its loss[4]."

Among the circumstances to be considered in the present case is that the application to the Court could well have been made many years earlier. As the Government of the United States stated in its Memorandum of Law of 1974:

> "In none of the outstanding proceedings is it possible for Raytheon and Machlett to recover any compensation which resulted from the acts and omissions of the Government of Italy on which this claim is based[5]."

Thus, if one considers the claim to be admissible contrary to the contention of the Italian Government, the claim would have been equally admissible in 1974.

The applicant Government's claim for compound interest finds little support in practice. The following quotation from the arbitral award in the *British Property in the Spanish Zone of Morocco* case appears to be particularly relevant in this context:

> "With regard to the choice between simple interest and compound interest, the Arbitrator must first of all state that arbitral jurisprudence concerning compensation that a State should grant to another for damages suffered by nationals of the latter — although it is particularly rich — is unanimous, as far as the Arbitrator knows, in denying compound interest[6]."

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[1] Memorial, **I**, p. 109.

[2] Docs. Nos. 41-42.

[3] 12 *Reports of International Arbitral Awards*, p. 252. In the original French the text reads as follows:

> "... il n'existe de règles de droit rigides d'ordre général qui prescrivent ou interdisent l'allocation d'intérêts. Le Tribunal ne saurait admettre les thèses des deux agents qui s'y réfèrent, d'ailleurs en des sens opposés. Ici encore la solution dépend largement des caractéristiques de chaque cas particulier."

[4] *I.C.J. Reports 1949*, p. 249.

[5] "The Claim", p. 56.

[6] 2 *Reports of International Arbitral Awards*, p. 650. In the original French the text reads as follows:

> "En ce qui concerne le choix entre les intérêts simples et les intérêts composés, le rapporteur doit tout d'abord constater que la jurisprudence arbitrale en matière de compensation à accorder par un Etat à un autre pour dommages subis par les ressortissants de celui-ci sur le territoire de celui-là — jurisprudence pourtant particulièrement riche — est unanime, pour autant que le rapporteur le sache, pour écarter les intérêts composés."

SUBMISSIONS

The Italian Government makes the following submissions:

"May it please the Court,

To adjudge and declare that the Application filed on 6 February 1987 by the United States Government is inadmissible because local remedies have not been exhausted.

If not, to adjudge and declare:

(1) That Article III (2) of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;
(2) That Article V (1) and (3) of the Treaty has not been violated;
(3) That Article V (2) of the Treaty has not been violated;
(4) That Article VII of the Treaty has not been violated;
(5) That Article I of the Supplementary Agreement of 26 September 1951 has not been violated;

and accordingly, to dismiss the claim."

16 November 1987.

(Signed) Professor Luigi FERRARI BRAVO,
Agent of Italy.

DOCUMENTS ANNEXED TO THE COUNTER-MEMORIAL OF ITALY

Document 1

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE ITALIAN REPUBLIC, SIGNED AT ROME, 2 FEBRUARY 1948, ENTERED INTO FORCE, 26 JULY 1949, 79 *UNTS* 171

*[Italian text not reproduced; for the English text see **I**, pp. 9-31]*

Document 2

AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION OF 2 FEBRUARY 1948, SIGNED AT WASHINGTON, 22 SEPTEMBER 1951, ENTERED INTO FORCE 2 MARCH 1961, 404 *UNTS* 326

*[Italian text not reproduced; for the English text see **I**, pp. 32-37]*

Document 3

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DOCUMENTS — BILLS AND REPORTS, NO. 246, PAGES 1-6, SESSION OF 17 DECEMBER 1948

[Italian text not reproduced]

BILL submitted by the Minister of Foreign Affairs (Sforza), in agreement with the Minister of Justice (Grassi), with the Minister of the Interior (Scelba), with the Minister of the Treasury (Pella), with the Minister of Finance (Vanoni), with the Minister of Industry and Trade (Lombardo Ivan Matteo), with the Minister of Defence (Pacciardi), with the Minister of the Merchant Marine (Saragat), with the Minister of Foreign Trade (Merzagora), and with the Minister of Labour and Social Security (Fanfani).

RATIFICATION AND EXECUTION OF THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, OF THE SIGNATURE PROTOCOL, OF THE SUPPLEMENTAL PROTOCOL AND OF THE EXCHANGE OF NOTES BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA, SIGNED IN ROME ON 2 FEBRUARY 1948.

Session of 17 December 1948

Honourable Deputies. On 2 February 1948 the Representatives of the Italian Republic and of the United States of America signed the Treaty of Friendship, Commerce and Navigation now submitted and proposed for your approval. It contains, in the first place, provisions on the right of settlement, followed by provisions on trade, navigation and transit, some general clauses, an additional protocol and a supplemental protocol. An exchange of Notes, providing for a supplemental cultural agreement, is attached to the Treaty.

The old Treaty of Commerce and Navigation, signed by Italy with the United States on 26 February 1871, has not been in force since 15 December 1937, following upon its termination one year before. This agreement replaces that Treaty, modelled on the old pattern of absolute free trade, and governs the broad category of Italo-American relations on the basis of modern criteria of a modern protectionism. Ambassador Dunn, upon signing the Treaty, pointed out that the new Treaty signed on 2 February 1948, was, also in its structure and form, a broader, more modern version of the old Treaty concluded 77 years ago.

This Treaty pursues essentially economic aims. It aims at strengthening trade relations with the United States of America, that are of the utmost importance to our country. The significance, well known to everybody, of our international economic relations, at a moment when the trend towards free trade re-emerges as the means destined to foster world economy and improve the standard of living in the various States, confers upon this Treaty a meaning which cannot be underestimated. In the framework of the progressive increase of commercial exchanges between our continent and North America, and in compliance with the resolutions contained in the ITO Charter, this Agreement is a precious contribution towards the regulation of our foreign trade.

The first part of the Treaty contains a number of provisions on the right of settlement (Arts. I-XIII). These provisions concern the treatment that each State grants to the citizens of the other State, guaranteeing, as a general rule, full freedom in the exercise of private activities, and drawing inspiration, in any case, from the principle of reciprocity.

The Treaty provides for, in the first place, the exercise of commercial, industrial, financial, scientific activities, etc., on the part of citizens of each State living in the territory of the other contracting Party: the exercise of these activities is permitted, except for the legal profession. It is undeniable that this clause is very advantageous to a large number of our countrymen living in the United States of America, since there are many professionals among our emigrants, in addition to unskilled labourers.

This first article obeys a criterion that we hope will be followed in future settlement agreements with other countries as well, since the exercise of professions is generally treated only fragmentarily in specific agreements with various countries. The provision presents the merit of covering all liberal professions (except for the above-mentioned legal profession), thus avoiding on one side resorting to the slow mechanism of subsequent agreements concerning the exercise of professions taken separately, and eliminating the difficulties of interpretation stemming from partial provisions on the other.

The provision under letter *(b)* of the same article, paragraph 2 (concerning the acquisition, the construction and the renting of buildings for the various uses to which they are destined), and Article II, paragraph 3, granting to juridical persons and to the associations of each contracting Party in the territory of the other Party treatment equal to that of private citizens, are equally advantageous. Article VII, with regard to the right of settlement, is equally significant; it provides for real rights in movable and real property to which private citizens, juridical persons and the associations of each Contracting State in the territory of the other State are entitled.

As far as the articles on real estate are concerned, acquisition, possession, and the other real rights are subject to conditions aiming on the one hand at complying with the domestic legislation of each State and at enforcing an equal treatment on the other, which should under no circumstances be less favourable than the one granted to citizens of any third State. In the articles concerning movable property, the freest disposition of property is granted to American citizens in Italy and to Italian citizens in the United States, whereas express provision is made for succession (both in the case of *mortis causa* and *inter vivos*), and for the relative acquisition of movable property. Similar provisions refer to all the matters concerning acquisition, property, renting and possession of movable property, resulting in the establishment of conditions absolutely equal to the rights enjoyed by nationals in the same matters.

Article XI provides for the exercise of those freedoms which should be protected in a truly democratic State; freedom of conscience and religion, freedom of publication and information cannot but be granted to those foreign citizens who offer serious guarantees to exercise them appropriately, never infringing the limits of public order.

Provisions on social matters are also present; they are particularly useful to our countrymen living in the United States, given the considerable emigration from Italy to the United States and the need to guarantee favourable work conditions to our workers in the US. The second part of Article XII, in fact, deals with social insurance, extending to the citizens of each State living in the territory of the other country the benefits granted by laws and regulations establishing compulsory insurance systems in favour of nationals.

The rules governing our trade relations with the United States begin with Article XIV. Similarly to those rules contained in international agreements envisaging exchanges of defined consignments, these rules show a trend toward the relinquishing of the autarchic system, which had proved anti-economic and incapable of increasing the national income. Against a background characterized by the quota system and by restrictions to international free trade, which is what the world is suffering from right now, any attempt to create a trade flow and to overcome, in the conventional way, the obstacles to economic relations among the States is commendable and deserves our fervid approval.

Like the Treaty of 1871, this Treaty provides for mutual freedom of trade between the territories of the two contracting Parties. This clause, however, has a much greater value today, given the gradual worsening of the international trade outlook after the First World War. Obviously this freedom, envisaged by the Treaty, is by no means unconditional: paragraph 3 of Article XIV explicitly admits the eventuality that one of the two Parties, on the basis of its domestic administrative legislation, therefore exclusively unilaterally, has imposed or may impose in the future any restriction to the import, sale, distribution and use of foreign products, including those of the other Party. What the two contracting Parties basically commit themselves to, is the mutual enforcement of the most-favoured-nation clause: in the first place each of the two States will have to refrain from imposing prohibitions or restrictions on the importation and to the use of the products of the other State other than prohibitions or restrictions imposed on all third States; secondly, as regards customs duties, formalities, customs clearance fees, taxation, sale and use of products either imported or destined to be exported, each of the two States undertakes to grant to the products of the other State a no-less-favourable treatment than the one granted at present or which will be granted in the future to the same products of any third State, or destined to it.

The significance of these provisions is inbuilt in the advantages of the most-favoured-nation clause: the clause allows a levelling of duties and has a liberal nature; it is destined to make relations among States tranquil because it avoids differential treatments and the contrasts deriving therefrom; moreover, it guarantees to domestic producers, vis-à-vis those foreign producers with whom they are in competition, an absolute equality of treatment on foreign markets.

The boost the Treaty is bound to provide to our commercial flows from and towards the United States of America does not rule out the possibility — should the situation so require — of our Government taking restrictive measures in connection with international trade. The Treaty allows Italy — on the basis of reciprocity — to enjoy a favourable treatment vis-à-vis the United States, since our products destined to be exported to the United States are subject to the minimum duties provided for by the US customs legislation, whereas the products we import and upon which export duties have been levied, are subject to the most-favoured treatment.

In the old Treaty of 1871, many rules envisaged the state of war and governed trade relations between the two States, specifying the duties and obligations — in the case of war — of the neutral State and of the belligerent State; even the eventuality of war between the two Parties was envisaged, in spite of the explicit condemnation contained at the beginning of Article 21 ("if, due to an unforeseen misfortune, God forbid, the two Parties were to wage war on each other . . ."). The new Treaty does not mention war, either in the case of war between the two Parties, or in the case of the two Parties waging war on a common enemy, or — finally — in the case of only one of the two States being at war with a third State.

This remark stresses the nature of the Treaty, destined to be an instrument of international solidarity, aimed at governing peaceful relations between the two

Republics on a large part of current economic problems. To the provisions on essentially commercial activities, in fact, other dispositions must be added, concerning financial matters (Art. XVII), contracts (Art. XVIII, 2nd paragraph) and generally all those matters which have been judged by the two States to be of common interest.

The clauses on navigation and transit, contained in Articles XIX-XXII, present some new elements, as opposed to the old Treaty, which deserve special consideration.

It must be pointed out, in the first place, that there is no reference whatsoever to warships (Art. XIX, paragraph 2); two exceptions refer to the assessment of the ship's nationality on the basis of the flag the ship is flying, and the shelter in ports or in internal waters to be granted to all ships of the other State which are in danger, owing to bad weather or other serious causes (for instance, in the case of damage suffered by the ship). The Treaty of 1871 on the other hand, in most of the clauses on navigation, made no distinction between warships and merchant ships, therefore including the former as well in the broad-based regulation of relations between the two countries. Furthermore, many articles of the old Treaty made reference to maritime war, and listed the goods to be considered, in the case of war, to be subject to the restrictions of contraband of war.

The above-mentioned elements are not present in the new Treaty, where the regulation is confined to trade relations arising from navigation and transit.

Within these limits, full freedom of navigation is granted to the ships of both nations on the basis of absolute equality, thus ensuring full compliance with the principle, regarded as of the utmost importance in international law, whereby merchant ships of all countries are free — as a general rule — to enter the territorial waters of other States and to go with their loads to the sea ports of foreign States for their commercial exchanges.

Moreover, the Treaty provides for absolute equality of treatment between the two Parties; in fact, in the case of one of the two States deciding to impose limits on the maritime navigation of foreign States, the treatment granted by one Party to the ships of the other Party should not be less favourable than the one granted to its ships by the said other Party.

The content of paragraphs 2 and 3 of Article XX is even more liberal; they lay down that, as regards harbour-dues, duties levied upon goods and passengers and in other similar cases, the ships of the other State are entitled to receive a treatment equal to the one enjoyed by national ships.

The above-mentioned dispositions and a number of other provisions concerning navigation and transit are in full compliance with the legal status enjoyed by the Italian merchant marine vis-à-vis the other States with which maritime navigation has been regulated at international level. In particular, the above-mentioned rules must be seen in the framework of the complex matter dealt with, in 1921 and 1923 respectively, in Barcelona and Geneva by a number of States, including Italy, but not the United States of America. An important result of the Italo-American Treaty, as regards navigation and transit, is therefore the extension to the United States, to our country's benefit, of most of the provisions that had been agreed upon in Barcelona and Geneva in the above-mentioned multilateral agreements. Italian navigation will receive considerable advantages from this procedure, all the more important at a moment when our productive effort aims, among other things, at ship building, while the readjustment of our balance of payments sees in the increase in sea freights one of its most important factors.

Article XXIV marks the beginning of a list of general rules, concerning, among other things, the matters where Italy and the United States reserve to themselves a wide freedom of disposition, regardless of and without prejudice to the commitments undertaken with the Treaty itself. Paragraph 1 of Article XXIV under letter *(f)* deserves special attention: it specifies the mutual position of the Parties vis-à-vis the commitments stemming from their being members of the International Monetary Fund. Thus the Treaty solves the possible cases of incompatibility among the clauses contained therein and those of the Washington Agreement of 1945 which set up, on a plurilateral basis and with the participation of Italy and the United States of America, the International Monetary Fund.

Paragraph 3 of Article XXIV lists the cases where the most-favoured-nation clause is not applied; in this list, basically, there is nothing new, since international practice is favourable to the imposition of most of the limitations set out in paragraph 3 of Article XXIV to the application of the most-favoured-nation clause. However, the specific remark contained in the Treaty aims at avoiding possible misunderstandings and conflicting interpretations of a rule of international law which is still purely consuetudinary.

Possible controversies on the application of the Treaty pertain, under Article XXVI, to the competence of the International Court of Justice, unless the Parties agree to settle them with other peaceful means. This is perfectly in compliance with what is set forth in the United Nations Charter, which refers to the International Court of Justice all the controversies of a judicial nature, namely, those where the claim of one Party and the resistance of the other are based on concrete elements represented by objective rules of international law.

In the last article, apart from the exchange of Ratifications to be carried out in Rome, the parties agree on the duration of the Treaty which is set as follows: ten years as of the date when the above-mentioned exchange of Instruments of Ratification will take place. However, a condition is added in paragraph 3 of the said article, concerning the expiration date as defined in the previous paragraph: the parties provide that, for the Treaty to be considered terminated at the end of the tenth year as of the date of its coming into force, one of the parties will have to express, one year before the expiration of the said one-year-period, its intention to this end, otherwise the Treaty will remain in force until one of the two States notifies its will to consider the Treaty terminated with one year's notice.

The content of the Protocol is explicitly considered as an integral part of the Treaty; it concerns some specifications the contracting Parties deemed useful to set forth, in connection with some provisions contained in the Treaty. Thus, paragraph 2 rules out, among the privileges granted to the citizens of one of the two Parties in the exercise of their commercial or industrial activities on the territory of the other Party, those privileges States grant to their public enterprises in the form of subsidies and aid for the supply of goods and services to the Government, and generally for public ends.

Paragraph 4 has a similar content; it provides for the exclusion from the free exercise of professions on the part of the citizens of both nations on the territory of the other State, professions whose members are appointed civil servants by virtue of law.

Paragraph 5 contains an obvious exception, concerning the safeguarding of the secrecy of military information in the field of freedom of publication and information.

On the whole, these rules emphasize the fact that, though granting to American citizens in Italy and to Italian citizens in the United States a broad-based freedom, the Treaty confirms the absolute respect of the sovereignty of each State, and guarantees the free exercise of the functions entrusted with the Governments, especially in those matters where the measures of State Authorities pertain to public security and domestic order.

The provisions of the Supplemental Protocol are an integral part of the Treaty as well. They are justified by the particular nature of the post-war economic situation, especially with regard to our Country. Therefore, if many rules in this Supplemental Protocol provide exceptions to the ones previously set forth, this is natural and admissible, even though it may appear to run counter to normal procedures in the field of treaties.

The reservations raised by the parties concern in the first place control on the commercial exchanges between the two parties, and precisely the adoption of import and export quotas; provision is made for four specific cases where it is possible to waive the rules contained in paragraphs 3 and 4 of Article XIV; in this case, each of the two States can impose on the goods directed to or coming from the other State stricter quantitative restrictions than those imposed on the same goods directed to or coming from third States; the assignment of the proportional quota, moreover, can be made independent, in the same cases, from the assessment of the volume of exchanges that have taken place in the previous period. These reservations allow Italy to avoid the damage deriving from scarce availability of foreign currency and its balance of payments deficit. On the whole, quotas are not an effective remedy to the trade balance deficit: the limits imposed on imports end up proportionally jeopardizing exports. But the quotas imposed on imports by the various countries can, in cases such as those provided for by paragraphs 1 and 2 of the Supplemental Protocol, be of help to the international balance, especially if they allow, as in the case of Italy, the use of non-convertible currencies that have been piling up in the meantime.

Further on, the Supplemental Protocol sets forth, in the field of expropriation of goods belonging to the citizens of the other State, the procedures that will be followed by Italy in the payment of compensation to American citizens, and fixes the exchange rate that will have to be applied.

The Treaty ends with this useful definition: an Exchange of Notes carried out between the Representatives of the Italian Republic and of the United States of America on cultural relations is attached to the Treaty itself. The two States undertake to promote closer relations in this field, through the interchange of professors, students and professional and academic personnel so as to facilitate and stimulate the mutual knowledge and study of institutions, literature, languages, etc. This aim is in compliance with the United Nations Charter, on the basis of which the Members envisage, among other things, through the Economic and Social Council and Unesco, of which Italy is a member too, the development of mutual cultural relations.

Honourable Deputies: The Treaty submitted to your approval is extremely useful to our Country. It is the best means for the safeguarding of the interests of our countrymen in the United States, and is at the same time an appropriate instrument for regulating our commercial and maritime relations with the United States.

The Treaty, guaranteeing absolute equality of mutual treatment to the two Parties, represents a further step towards the return to normalization in our international relations. For Italy to resume the place it is entitled to in the great community of States, it is necessary — on Italy's part — to comply with the principle of international solidarity, which is constituted above all by a close-meshed net of economic agreements.

This Treaty is an instrument of peace, like all previous trade Treaties concluded by Italy from 1945 onwards; it aims at abandoning the protectionist system while guaranteeing to our Country at the same time the safeguarding of its particular interests arising from our abnormal economic situation. By ratifying this Treaty, Italy will prove once again its determination to recover from the collapse caused by the war and the peaceful intentions underlying its foreign policy.

BILL

Article 1

The President of the Republic and the Government are respectively authorized to ratify and to enforce the following Agreements signed in Rome, between the Italian Republic and the United States of America, on 2 February 1948:

(*a*) Treaty of friendship, commerce and navigation;
(*b*) Signature Protocol;
(*c*) Supplemental Protocol;
(*d*) Exchange of Notes.

Article 2

This law comes into force on the day of its publication in the *Official Gazette*.

Document 4

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DOCUMENTS — BILLS AND REPORT, NO. 246-A, PAGES 1-9, SESSION OF 17 DECEMBER 1948

[Italian text not reproduced]

Report of the Committee for Trade Treaties and Customs Legislation on the Draft Bill presented by the Minister of Foreign Affairs (Sforza), in conjunction with the Minister of Justice (Grassi), the Minister of the Interior (Scelba), the Minister of the Treasury (Pella), the Minister of Finance (Vanoni), the Minister of Industry and Trade (Lombardo Ivan Matteo), the Minister of Defence (Pacciardi), the Minister of the Merchant Marine (Saragat), the Minister of Foreign Trade (Merzagora), and the Minister of Labour and Social Security (Fanfani).

Session of 17 December 1948

RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND OF THE EXCHANGE OF NOTES AGREED IN ROME, BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948.

Presented to the Presidency on 2 March 1949.

REPORT OF THE MAJORITY

Honourable Colleagues. The new "Treaty of Friendship, Trade and Navigation" between Italy and the United States, which is submitted to you for approval, is of particular significance since it is the first wide-ranging and general treaty since the war to have been negotiated by us on a footing of absolute equality.

The new instrument is characterized by the broad scope and the modernity of its structure. It contains clauses referring to establishment (Arts. I-XIII), to trade (Arts. XIV-XVIII) and to navigation and transit (Arts. XIX-XXIII). The Treaty is completed by the customary general and final provisions (Arts. XXIV-XXVIII), a Protocol and an additional Protocol which form an integral part of the Treaty itself. Also annexed to the Treaty is an exchange of Notes referring to the opening of negotiations concerning the stipulation of cultural agreements. In fact, on 18 December 1948 there followed the signature in Rome of a special cultural agreement, while negotiations referring to a general cultural agreement are still in progress.

The importance of the new instrument and the advantage accruing from it to our country are due not only to the above-mentioned broad scope of the relations regulated in it but also and principally by the approach made to the establishment of such relations.

As stated in the Preamble, the Treaty is "generally and unconditionally based on the principles of national treatment and of that of the most-favoured nation".

The value of this approach is quite apparent, ensuring as it does the automatic and unconditional extension of all benefits granted or to be granted by the United States to any third country.

From this standpoint the various clauses of the Treaty should be examined to ascertain their scope fully and to make an adequate appreciation of their advantages.

However, before proceeding to analyse the individual provisions of the Treaty, some further general observations seem to be called for.

The new Treaty of Friendship, Trade and Navigation differs radically from the Italy-United States trade and navigation treaty of 26 February 1871. It was not possible to resurrect this old treaty, which in any case was reciprocally allowed to expire on 15 November 1937.

The instrument signed on the "twentieth day of February" of 1871 had aged irremediably and now reflected a situation of relations and exchanges which had since changed radically.

With regard to economic relations, the 1871 Treaty followed a distinctly free-trade approach, which made it virtually inapplicable when economic policy began gradually to shift towards protectionism and autarchy, nor was it compatible even with the new principles on which economic relations between States should be based. These new principles tend towards multilateral exchanges, although without excluding restrictive clauses intended, particularly during the early stages, to safeguard specific needs linked to special currency, production and labour conditions in the several countries.

Even the statutes of the international organizations created after the war to implement economic collaboration between nations, such as the International Monetary Fund and the International Trade Organization reflect the need for such flexibility as is required by environmental and market conditions.

As stated above, the rigid framework of the old treaty did not allow for this necessary flexibility, particularly as far as tariff policy was concerned.

The present situation, which is the outcome of the protectionist régime set up during the decade between 1929 and 1939, can only be changed gradually.

The forthcoming Annecy Conference should mark a further decisive step forward towards the reduction of customs tariffs. These results, which may legitimately be expected, together with those already obtained in the multilateral agreements, should encourage that additional expansion of international trade on which the chances of recovery of our economy depend.

This situation, which has slowly but surely been constructed since the Second World War, forms the background to the new Italy-United States Treaty. The Treaty is bound to become an important factor in the economic relations being organized on a multilateral basis.

The unconditional principle of most-favoured nation, on which the new Treaty has been seen to be based, represents the levelling and unifying mechanism by means of which the provisions of the bilateral treaties, already negotiated or to be negotiated, by being applied automatically to the contracting parties, allow the basis of agreement to be extended and a multilateral system to be gradually built up.

As pointed out above, the merit and distinguishing features of the new instrument are the broad scope and modernity of its structure compared with that of similar previous treaties.

This must also be interpreted as a reflection of the new conception underlying the Charter of the United Nations which is a marked improvement upon the Pact of the League of Nations in that it explicitly acknowledges the interdependence between the economic-social factor and the political factor, together with the decisive importance of the former vis-à-vis the latter (cf. Art. 55 of the UNO Statute).

These broader and topical conditions are addressed not only by the trade clauses of the Treaty but also by those referring to establishment. Also this section, as we shall see, is affected by new tendencies such as those referring to the guaranteeing of the fundamental freedoms. These principles, which are more and more firmly established in world consciousness and more and more precisely embodied in international statutes, form the basis of several provisions contained in the Italy-United States Treaty, for instance, those guaranteeing the freedom of worship, of information, etc. (cf. Art. XI).

* * *

However, the wide-ranging and modern character of the Treaty outlined so far must not be taken to mean that it can contain clauses which, by their nature, are extraneous to the matters dealt with in the Treaty itself, namely *establishment, trade* and *navigation*.

The Treaty does not contain political clauses. The title of "Treaty of Friendship, Trade and Navigation" corresponds to a traditional formula in long-standing use. It should also be noted that the Treaty is a *trade treaty* and not a trade agreement. In other words, it regulates the basic approach to be followed in the trade relations between the two countries, while the actual determination of the manner in which individual exchanges are to be carried out is left to specific *trade agreements*.

Therefore, although containing several general principles of fundamental importance, the Treaty does *not* directly regulate the problem of *customs tariffs*. This matter will be governed by specific technical agreements providing for the implementation of the fundamental principles embodied in the Italy-United States Treaty and the multilateral pacts. As pointed out above, favourable results concerning the solution of these problems are expected from the forthcoming Annecy Conference.

Lastly, it must be pointed out that the Treaty is a treaty of establishment, that is, it contains clauses regulating the treatment guaranteed to citizens of one State residing in the territory of the other. Naturally, these clauses are of particular importance for our emigration, that is, for our fellow citizens resident in the United States.

However, the Treaty is not an emigration treaty or agreement, that is, it does not contain provisions referring to emigration, as they would be out of place in a treaty of trade and navigation establishment such as the one signed on 2 February 1948. As is known, the problems related to emigration involve the examination and regulation of technical details which are normally embodied in special conventions between the States concerned.

The issue of a possible increase of our migratory flow towards the United States is therefore not mentioned in the Treaty provisions. This is a highly complex issue also because the immigration of foreigners is regulated by complex legislation in the United States (*immigration laws*) which regulates the migratory flow from other countries in the world by means of a quota system. The revision of the quota assigned to Italian emigration involves a revision of the entire system, so that the Italian aims can only be achieved through painstaking negotiation. This does not mean that the problem should not be raised as soon as possible and that the Government should not be urged to evaluate the importance of the matter and make every effort to find a solution. Partial solutions can in the meantime be found in occasional circumstances, such as the utilization of the quotas falling due during the wartime period, and it is no exaggeration to state that our emigration needs today to receive greater understanding from American public opinion and from the United States government authorities.

Having thus described the characteristic approach followed in the new Treaty, and illustrated the principles on which it is based and the matters it deals with, the various provisions making up the text will now be outlined. The evaluation of their scope will certainly be more effective if the examination keeps to the framework of general considerations forming the introductory part.

The examination may be carried out by grouping the various clauses according to the topic referred to, namely:

(1) Establishment (Arts. I-XIII).
(2) Trade (Arts. XIV-XVIII).
(3) Navigation and transit (Arts. XIX-XXIII).
(4) General and final clauses (Arts. XXIV-XXVII), Protocols and exchange of notes.

I. Provisions regarding Establishment (Arts. I-XIII)

As a whole, these provisions do not differ appreciably from those normally contained in similar treaties. They are of special interest to Italian citizens residing in the United States in so far as they guarantee the latter will receive most-favoured treatment with regard to the free conduct of their work and their activities.

In this matter the Treaty is based on the principles of national treatment and on that of the most-favoured nation. In particular, specific acknowledgement is accorded to the free exercise of the professions (Art. I) and social insurance benefits have been extended to citizens of the other party to the treaty (Art. XII).

The free exercise of the profession has an exception in the legal field, in that the exercise of this profession in the United States is considered to be incompatible with being a foreigner. The substance of the relevant provisions contained in the Treaty consists in the acknowledgement of that the fact of being a foreigner does not in itself preclude anyone from exercising a given profession or activity.

It is a known fact that the regulation of the exercise of professions and other activities by foreigners comes within the purview of the legislation of the various states comprising the Union of North America. However, it is also a known fact that international treaties have, as it were, the force of federal law in US constitutional law: their provisions prevail over those of the legislation of the various states of the Union. The recognition obtained in favour of Italians resident in the United States is thus guaranteed also against any restrictive provisions contained in the laws of individual states. This concession stipulated in the Treaty is all the more significant in that the US federal authorities are usually loath to interfere in matters which are the responsibility of the individual states.

With regard to the extension of social security benefits to citizens of the other party to the contract, while it is true that in the internal legislation of the United States provision has already been made for this extension to the benefit of foreigners, the fact of including it in the Treaty implies that such concession, hitherto free and unsolicited and therefore revokable by the US Government, has now become an internationally contracted obligation.

As already mentioned, the Treaty does not contain any clauses referring to emigration. Therefore the right granted to citizens of one party to the treaty to enter, reside in and travel freely through the territory of the other is understood by the United States to be subject to the application of the immigration laws. At the request of Italy the new paragraph 4 was added to Article I in order to guarantee the right of surveillance of foreigners resident on the territory of the State and the right to expel them for certain reasons. These are guarantees that no State would agree to forego for elementary reasons of security.

Also noteworthy are the provisions governing the activity of juridical persons who, in the present economic and commercial conditions, have much more extensive and important tasks than those of single individuals.

The specific examination of several of these clauses could lead to the erroneous interpretation that the treatment accorded to the juridical persons and associations of the other party are not perfectly reciprocal. In this connection it must be pointed out that the apparent lack of reciprocity is a necessary consequence of the federal nature of one of the two parties to the treaty, namely, the United States. A similar situation and solution is found in the establishing and consular Convention between Italy and Switzerland. It would in fact be inadmissible that in one state or in one canton of a Confederation a foreigner enjoyed more favourable treatment than that accorded to a citizen of another state or canton of the Confederation itself.

With reference to the protection of goods, the principle of expropriation with guaranteed payment of "fair compensation", normally embodied in treaties of establishment (cf. for example the Italo-Soviet Treaty of Trade and Navigation of 4 February 1924, Art. 6), has been developed to a considerable extent in the new Italy-United States Treaty. This was considered necessary also in view of other problems such as currency problems which arise out of the investment of capital abroad. The complex of provisions concerning these problems aims at ensuring and encouraging capital flow towards Italy. The advisability and importance of this clause is quite evident because of the peculiar economic and financial structure of our country, in which the accumulation of savings does not correspond to productive needs or to any programme of full employment. The influx of foreign capital represents an indispensable supplement for our country.

The provisions contained in Article XI are based on the principles of the fundamental freedoms of man. They are in full harmony with what is guaranteed by the new Constitution of the Italian Republic. With regard to the freedom of the press and of information, expressed in Article 21 of our Constitution, it should be borne in mind that paragraph 5 of the Protocol annexed to the Treaty makes express reservations for the needs of military secrets.

Also the provisions of Article XIII, intended to solve a number of problems related to the military service of citizens of one party to the treaty resident in the territory of the other party, reference can be found in preceding treaties (cf. for instance the Italy-Argentine Convention of 8 August 1938).

II. Trade Provisions (Arts. XIV-XVIII)

The clauses referring to trade are aimed at eliminating constraints and discriminatory measures. Following the criteria on which the Charter of the International Trade Organization was based they indicate a way, a direction, in that the economic and political circumstances do not allow abrupt changes in economic policy but call for gradual steps in order to shift from a state of bilateral agreements to one of multilateral exchanges.

Having asserted the principle of the most-favoured nation with regard to the application of customs duties and taxation, a commitment is made also to a non-discriminatory policy as regards quantitative restrictions. Nevertheless, the additional Protocol contains important exceptions which serve also to harmonize the obligations accepted under the Treaty with the provisions of the Agreement on the International Monetary Fund. The exceptions take into special account the economic cycle characterizing the post-war period.

The clause dealing with trade concludes with paragraph 3 which deplores business methods in which competition is limited, access to markets restricted and monopolistic controls encouraged. Provision is therefore made for each party to the treaty to attend consultations at the other party's request should any such situation be complained of.

III. Provisions referring to Navigation and Transit (Arts. XIX-XXIII)

Also the content of these articles does not differ substantially from that of the corresponding provisions contained in similar treaties. Provision is made to treat the merchant vessels of the Other Party to the Treaty on a par with national vessels and to extend to them the most-favoured-nation treatment. For warships and fishing vessels the norms contained in the Treaty correspond both to internal Italian legislation (cf. for instance Art. 20 of the Italian law on neutrality, approved by Royal Decree No. 14-15 of 8 July 1938) and to the international conventions (see Arts. 12-13 of the Hague Convention referring to the rights and obligations of neutral Powers in the case of war at sea).

IV. General and Final Provisions, Protocols and Exchange of Notes

Article XXIV and the additional Protocol contain the exceptions to the applicability of the Treaty norms: the purpose of these exceptions is to reconcile the present needs of the Italian economy with the economic policy directives underlying the Treaty, again for the purpose of ensuring that the Agreement fosters the free development of the economy on an increasingly broad basis and with the graduality required by the peculiar situation having arisen after the war.

Annexed to the Treaty is an exchange of Notes referring to the opening of negotiations for the purpose of establishing cultural agreements between Italy and on 18 December 1948 a special cultural agreement was signed between Italy and the United States, and a general cultural agreement is currently being negotiated.

* * *

Honourable Colleagues. The new Italy-United States Treaty, which the majority of the Committee for trade and navigation treaties submits for your approval, is generally and unconditionally based, as is expressly stated in the introduction, on the principles of national treatment and of most-favoured-nation treatment. It represents an important result of the efforts made by Italy to regain its place in the international field and is to be appreciated also for its modern approach and the discernment of the technical rules contained in it.

The principles of equality and reciprocity on which the new Treaty is based will be of certain advantage to Italian interests. There is no doubt that the recognition of the equality and reciprocity of rights does not remove the inequalities of structure which exist between the several countries at the international level, just as the principle of juridical equality of individuals does not eliminate the natural differences of capacity and opportunity which exist between individuals and which laws can only correct and compensate for, but never eliminate completely.

International agreements must lay the foundations for a broader-based solidarity aimed at reducing the unremovable differences deriving from the complex of geo-political conditions of the individual States forming the international community. This is the aim of the new Treaty, which basically sets out to be an instrument for the development of international relations to guarantee the prosperity and progress of peoples and to strengthen the peaceful relations between them.

Campilli, Rapporteur for the majority.

REPORT OF THE MINORITY

Honourable Colleagues. The considerations that have led the minority group of the Committee to table its own report substantiating the proposal to vote against the ratification of the present Treaty can be summed up in the following points:

Point I. Strictly speaking, the Treaty is not a treaty of trade and navigation. The Treaty is a separate entity, but at the same time takes for granted the preceding ERP agreements and its spirit foreshadows further developments involving not only economic and trade matters but also the future trends of our foreign policy. The economic conditions of Italy are such as to lead to a positive opinion being expressed on every trade treaty negotiated with any power whatsoever in the reciprocal interest of our country and of the other party to the treaty. Such treaties, based on reciprocal advantage and on the scrupulous respect for the economic and political independence of the parties thereto, are always to be preferred to diplomatic instruments that are ultimately restrictive of economic and political independence, as was the case of the ERP agreements. Unfortunately the present Treaty continues the policy begun with the ERP agreements. The report of the majority states that "the wide-ranging and modern character of the Treaty", "must not be taken to mean that it can contain clauses which, by their nature, are extraneous to the matters dealt with in the Treaty itself", namely *establishment, trade* and *navigation*: however, the report itself cannot but mention the interdependence which exists between the economic-social factor and the political factor as one of the characteristics of the Treaty.

Together with the bilateral agreements and the ERP agreements, also the present Treaty is an instrument which, by means of a number of articles (Arts. IV, VII, XI, XIII, XIV, etc.) approves the increasing economic and political penetration of Italy by US imperialism.

Point II. The Treaty is presented in such a way as to appear to be based on principles of absolute equality and reciprocity. In fact, such equality and reciprocity are false, not only because the great difference in economic power between the two Countries and the absence of guarantees and safeguards for the Italian economy objectively lead to a situation in which equality and reciprocity are purely formal, but because of a number of other considerations. For instance, when mention is made in Article IV of the right granted to citizens and juridical persons and associations of each of the parties to the treaty of carrying out research and exploiting the mineral resources of the other party, it is clear that this article is to the almost exclusive advantage of the United States, since no one would believe that Italy could reciprocally carry out research and exploit mineral resources in the United States of America. The same can be said for the exportation and movement of capital, which normally takes place in one direction, in favour of the United States of America. This is due in the first instance to the existence of an obvious actual inequality and because no defence of the Italian economy is envisaged against certain particular forms of penetration of Italy by American capital which are not in the national interest. Here we are dealing with an objective inequality between the two economies and it cannot be reasonably claimed that this inequality in itself should be an obstacle to the trade relations between economically weaker nations and economically much stronger ones: all that it is intended to assert here is that, in such cases, a trade treaty safeguards the interests of the economically weaker country in so far as it contains a number of measures of protection and economic guarantees in favour of the weaker party, which system of protection and guarantees is not to be found in the present Treaty.

It is not therefore only to the aforegoing that we refer mainly when we state that the Treaty lacks the characteristics of equality and reciprocity; we refer to the fact that to a number of reciprocal concessions provided for in the Treaty itself actually exclusively favours the United States of America and cannot favour Italy, since they are obstructed by a number of United States laws which are not and cannot be modified by the Treaty itself. For example, Article I lays down that the citizens of each party to the treaty will be entitled to enter the territory of the other party and reside and travel freely in the said territory. But while the article in question is valid for United States citizens coming to Italy it cannot be valid for Italian citizens wishing to go to the United States, for whom the severe US immigration laws continue to exist. Furthermore, also for Italian citizens not migrating to the United States, and even for those merely requesting a transit visa, the relevant severe laws of the United States apply fully to Italian citizens who are denied visas for both immigration, temporary stay and transit without being required to fill out the extremely detailed forms which provide a hundred pretexts for refusing the visa and to fill out which we Italians are even obliged to undergo the humiliation (and we are the only country in the world to be subjected to this treatment by the United States of America) of declaring in writing whether we belong to the southern Italian *race* or to the northern Italian *race*. Article I of the Treaty of friendship, trade and navigation is thus doomed to remain inapplicable and it does not seem out of place here to point out that, despite the proclaimed right to enter, reside and travel freely in United States territory extended to all Italians, in the past few weeks even two colleagues, the Deputy Michele Sala and the Senator Mario Palermo were refused an entry visa on their service passports without further explanation. Equally specious and ineffective is paragraph 2 of Article I, which allegedly grants reciprocal rights to the citizens of the two countries, and therefore to Italian citizens in the United States, to freely carry on professional activities, except that of the legal profession. It has been asserted in the Foreign Affairs Commission that this involves the recognition of an Italian academic qualification for every professional activity other than that of the legal profession. But this is not true either. Also as far as the recognition of the academic qualification (and this observation is all the more true as far as the exercise of the profession is concerned) the laws of the United States are so designed as to render Article I of the Treaty ineffective. Suffice it to recall, for instance, that by means of an internationally inadmissible procedure the state of Connecticut recognizes as valid only three degrees, granted by the Universities of Naples, Rome and Bologna; the state of New Jersey recognizes as valid the academic qualifications awarded in Italy to American citizens and not those obtained by Italian citizens, etc. The report of the majority claims that "international Treaties have, *as it were*, the force of federal law under the US constitution: their provisions prevail over those of the legislation of the various states of the Union". The report goes on to say that "the recognition obtained in favour of Italians resident in the United States is thus guaranteed also against any restrictive provisions contained in the laws of individual states".

According to the report of the majority, this concession stipulated in the Treaty is "all the more significant in that the US federal authorities are usually loath to interfere in matters reserved to the competence of the individual states". Apart from the fact that we dispute the assertion that international treaties have "*as it were*" the force of federal law in those matters in which US legislation grants the individual states the right to legislate, anyone with even a superficial knowledge of American legislation and political life knows very well that it would be impossible to guarantee the enjoyment by foreign citizens of a given nationality of privileges denied to foreign citizens of another nationality. This impossibility is particularly obvious in the case of Italians who, in the few specific cases in which they are considered as a nationality different from the others (see, for example, the immigration laws) constantly receive worse treatment than the citizens of other countries. The United States legislation has recently made exception only for the citizens of territories considered as colonies or quasi-colonies of the United States, such as Puerto Rico or the Philippines; in view of the specific nature of these exceptions, it would be odd if they were extended to Italy.

Likewise, the rights and privileges granted to Italian citizens in paragraph 2 of Article I, together with the rights granted by paragraph 2 of Article XI, which, in addition to commercial, industrial, processing, financial, scientific, educational, religious, philanthropic and professional activities, makes provision also for the right to engage in activities such as the editing, communication and collection of information intended to be made public, the use of the press, radio, cinema and other media and any other activity of this type reciprocally allowed to American citizens in Italy and to Italian citizens in the United States, as usual is applicable only to American citizens in Italy. Reciprocity is non-existent because, as far as Italian citizens resident in the United States are concerned, all activities of this kind, as in the case of all other foreigners, are regulated by the strict provisions of the fundamental US legislation known as the *Alien Act*, which categorically establishes that any foreign citizen carrying on this kind of activity in the United States at the behest of their own country or in any case at the behest of foreign agencies or individuals, must be registered in the United States as a *Foreign Agent* with all the considerable disadvantages that this term entails. This is a law which has no equivalent in Italy or any other country, since it can in no way be compared with the common law and order provisions applied to foreigners, which involve quite normal controls and imply at least a criterion of reciprocity between all States.

The *Alien Act*, on the other hand, has an incomparably wider scope and can affect the activities of foreigners resident in the United States in whatever form they are carried on, suppress them, restrict them or change their orientation.

Therefore, the freedom of the press, radio, cinema or other media, guaranteed for the Americans in Italy, will take on a completely different form in America since, however the provisions of paragraph 2 of Article XI are formulated, any attempt to use the press, radio, cinema and other media to express economic, political and artistic ideas and opinions, the expression of which in Italy is guaranteed and permitted by the Constitution, will perhaps be permitted to American citizens in America but, on the basis of the *Alien Act*, prohibited or even punished when carried out by Italian citizens, as well as by other foreigners, on the basis of the law against un-American activities in the United States.

With regard to the extension to the citizens of the other party to the treaty of the benefits described in paragraph 2 of Article XII (social insurance), it must be said that the statement contained in the report of the majority is meaningless, namely, that this concession, hitherto free and spontaneous and therefore revokable by the American Government, has now become an internationally accepted obligation by virtue of the Treaty. In the first place, social insurance for foreigners is a law of the State and not a free and spontaneous concession; in the second place, it is not a concession made to Italians (as the Treaty makes out) but to foreigners from any country at all. Paragraph 2 of Article XII of the Treaty does not and cannot change anything, therefore, as far as the pre-existing situation is concerned, as it is absolutely inconceivable for anyone with even an elementary knowledge of American law that social insurance should be granted to foreigners of a given nationality and not granted to foreigners of other nationalities. This would clash with the fundamental principle of American legislation concerning foreigners, which is unalienably that of equality of treatment in order to encourage the rapid Americanization and the rapid national assimilation of all foreigners resident in the territory of the United States of America. For the above reasons these benefits are extended to everybody and, as far as Italians are concerned, therefore, they can neither be granted nor withheld by paragraph 2 of Article XII of the Treaty, so that the formulation of the article in question sounds very odd, stating as it does that the benefits provided for by laws and regulations establishing compulsory insurance systems *will be* granted to the citizens of each party to the treaty.

Point III. The trade agreement between the United States and Italy would really have been advantageous had it solved in Italy's favour the problem of the emigration of our labour. In fact, even though this matter is normally provided for in special conventions, it is not because of a formal reason of this kind that it has been excluded from the present Treaty. It has already been seen that one of the characteristics of the Treaty is to overstep its economic limits and to enter the fields of political and cultural relations, etc.; since the Treaty makes repeated mention of the treatment extended to Italian immigrants in the United States, it could have treated the problem of immigration in general outline, opening up brighter prospects for a treaty or specific agreement more favourable to Italy. The truth of the matter is that in this question, the only one *in* which a real advantage to Italy was possible, the Treaty makes no concessions to Italy. It must not be overlooked that the same wretched annual immigration quota allowed us is largely illusory in that, instead of being filled by migrants actually going to the United States from our country, it is filled by the immigration offices of the United States themselves who send to Cuba or to Canada the Italians resident in the United States but not included in the quota, in order to have them included in the immigration quota and thus legalize their position, filling the greater part of the quota without any migration from Italy actually taking place.

Point IV. In view of the characteristics of this Treaty and because the principles of equality and reciprocity on which it claims to be based are in many cases non-existent or purely formal, it would have been particularly important for the Italian Government to have reserved the right to take any necessary measures to protect the Italian economy and to restrict the economic and political penetration of United States imperialism in Italy. One of the reasons which increases our distrust of even the purely economic terms of the Treaty is that the present Government has displayed such an acquiescent attitude to the United States and has undertaken and continues to undertake such wide-ranging commitments as to exclude any government will to intervene in any way in future in the form of protective and restrictive measures in favour of the Italian economy.

This situation further worsens the terms of the contract and increases the responsibilities involved in any ratification of the Treaty. It would appear to be no exaggeration to consider a number of aspects of this Treaty, and of the relations being established between the United States and Italy, rather than on a footing of equality and reciprocity, to be based on an economico-political footing resembling that of the *Open Door* policy previously adopted by the great powers vis-à-vis China, with all the implications and consequences this is known to have engendered. For these reasons we do not consider that the Treaty is an instrument working in the interest of our Country and we believe that Parliament should refuse to ratify it.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority.

Draft Bill of the Minister	*Draft Bill of the Committee*
Article 1	*Article 1*
The President of the Republic is hereby empowered to ratify, and the Government to give full and complete implementation to, the following Agreements signed in Rome, between Italy and the United States of America, on 2 February 1948: (*a*) Treaty of Friendship, Trade and Navigation; (*b*) Protocol of signature; (*c*) Additional protocol; (*d*) Exchange of Notes.	*Idem*
Article 2	*Article 2*
The present law shall come into force on the date of its publication in the *Official Gazette*.	*Idem*

Document 5

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DEBATES, SESSION OF 24 MARCH 1949, PAGES 7396-7404

[Italian text not reproduced]

DISCUSSION OF THE DRAFT BILL: RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND OF THE EXCHANGE OF NOTES AGREED IN ROME, BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948 (246)

Chairman: The item on the agenda is the discussion of the draft bill: Ratification and implementation of the Treaty of Friendship, Trade and Navigation, of the Protocol of Signature, of the additional Protocol and of the Exchange of Notes agreed in Rome, between Italy and the United States of America, on 2 February 1948.

I hereby declare open the general discussion.

The Rt. Hon. Pesenti is on the list of speakers.

He has the floor.

Pesenti: Honourable Colleagues, the draft bill, which has been submitted to us for ratification, bears a heart-warming title: it speaks of a treaty of friendship, trade and navigation. It thus appears, after the various unilateral impositions that we, I say we in the sense of this Chamber, and not of the Group that I represent, have had to accept through the various agreements, in particular the ERP agreement, we have finally been presented with a treaty, that is, an agreement negotiated between the two parties on an equal footing, which contains clauses equally safeguarding the interests of both parties to the treaty.

Moreover, this treaty also speaks of friendship, that is, it extends beyond clauses of a merely economic and commercial nature, in order to establish a situation of friendship which is embodied in a word dear to all those, particularly on our side, who want peace and friendship with all the nations of the world, with all countries, with all the peoples of the world, and thus also with the people and the State of the great North American Republic.

If, therefore, I shall personally show that I cannot give my consent to the ratification of this treaty, it is because the truth hidden beneath the title I have just read out is basically different; because it is neither a treaty nor a treaty which guarantees friendship, unless we mean friendship in the sense of the well-known proverb which runs "God protect me from my friends and I shall protect myself from my enemies".

The true situation indicates that this treaty is an instrument which is part of a whole set of instruments designed to implement what we consider to be the will to imperialistic expansion of the United States. Therefore also this treaty, in order to be understood, cannot be considered as standing alone; and even if it is considered as standing alone, it is nevertheless a serious matter and such as to jeopardize the interests of our Country. But its nature, its seriousness, vis-à-vis the interests of our Country increase if we consider it, together with the other instruments, as the expression of this will to expansion, to dominion, of United

States imperialism. All this is ignored in the report — whether the ministerial report or that of the majority by the Rt. Hon. Campilli — which is therefore unsatisfactory (to say the least) because I cannot imagine, particularly on the part of the Rt. Hon. Campilli, an ignorance of what I am going to say and of what will be said also by my colleague, the Rt. Hon. Berti, namely an ignorance of the arguments we shall present against the ratification of the treaty.

But if this general aspect, this particular characteristic of the treaty, in so far as it is an instrument of the will to dominate of the United States, is overlooked and is not mentioned either in the ministerial report or in that of the majority, it could be said to represent a political fact deriving from the overall policy of the Christian Democrat Government or of the Christian Democrat coalition and is therefore, I should say, a desired shortcoming.

But, in my opinion, the report — both the ministerial report and that of the Rt. Hon. Campilli — contains also technical shortcomings. This is even more serious since, if the task of the opposition is to approach the fundamental problems from a general point of view with regard to the Country's interests, the task of the majority should be at least to make a technical contribution to the solution of such problems; that is to say, having fully accepted the government's policy from the outset, to correct any technical defects contained in the legislative measures.

In my opinion the Rapporteur for the majority has not fulfilled even this task, which should indeed be carried out by the majority itself.

Allow me, therefore, honourable colleagues, to express the reasons underlying our disapproval of ratification, that is, to express the reasons for which we consider this treaty not to represent a free agreement — that is, a treaty corresponding to the interests of both parties — but to represent instead another instrument serving in particular a single party, the United States, and which does not guarantee that the interests of our Country will be defended.

We must of course have a treaty of trade and navigation with the Republic of the United States. Therefore, on the expiry of that of 26 February 1871 — as far back as 15 December 1937 —, and after the war and its aftermath with which we are all familiar, it is logical, as I have said, that a new treaty should be negotiated. But what sort of treaty of navigation and trade would it have to be to really correspond to the needs of our Country?

The 1871 Treaty was a normal trade and navigation treaty: there was no need to speak of friendship because the friendship derived from the good economic and trade relations it set up, from the most-favoured-nation clause underlying the treaty, from the facilities it accorded to citizens of the two countries in carrying on their actual business affairs. In other words, it was not a treaty of establishment or one with a broader cultural or political nature, and it took into account the basic inequality of the situation in the two contracting countries. That is to say, there was equality and reciprocity with regard to trade and navigation, freedom of travel, of residence in general, of doing anything deemed necessary for trade, under the same conditions for both parties; but it was limited to these points.

By this I by no means wish to challenge the statement of the Rapporteur of the majority that the economic relations between the two countries have expanded and it is therefore necessary also to go beyond the narrow limits of trade and navigation and take into consideration also the other relations of an economic nature between the two countries, relations which have become more complicated, such as in the currency and monetary fields and in that of the transfer of goods and persons; also because the transfer of capital in particular has increased, especially since the First World War. I therefore do not wish to mean that the new treaty must be limited to the 1871 type. But there is the world of difference between the principle of extending the treatment to other economic relations and thus of making a wider-ranging treaty and ending up with the treaty we are examining because (as can easily be seen) the norms contained in this treaty establish, not a condition of equality, which is nevertheless repeatedly stated in the ministerial report and in that of the Rt. Hon. Campilli, but a condition of intrinsic as well as juridical superiority, that is, substantive as well as formal, of the United States in fields much broader than that of trade. Therefore, precisely because of the actual content of the treaty, which is so broad in scope and gives such extensive powers to the United States, it is clear that the treaty is part of that set of instruments which make up the expansionist policy of the United States. What do these instruments consist of? We have outlined them on a number of occasions here, in the Chamber, when defending our national interests, the interests of our Country, vis-à-vis all the international instruments that we have had to deal with here.

At the time when the Constituent Assembly discussed the Bretton Woods agreements (even though we too approved them to some extent) we declared quite clearly: gentlemen, this is not an international agreement in which all the countries are presented on an equal footing, here we are dealing with an international organization which regulates the currency exchange rates between the various countries through an international fund that is clearly dominated by the United States because, we said, both in the International Monetary Fund and in the International Bank for Reconstruction and Development 31 per cent of the votes are held by the United States; if to these votes we add the further 25 per cent held by the British Empire, we have an absolute majority for the Anglo-Saxon bloc and for the United States in particular.

We have pointed out this situation not only with regard to these agreements which represent what I should define as a permanent instrument of the United States policy of dominion, but also with regard to politically even more serious and obvious instruments that should be temporary, but are actually permanent.

We made similar and more firmly grounded statements when we discussed the ERP agreements, revealing their unfair nature and the economic and political predomination of the United States; their distinctive political nature is no longer denied by anyone, now that instead of wheat the idea is to send us arms. The non-temporary nature of these agreements is also revealed by the other complementary agreements, particularly now that you have approved an Atlantic Treaty which lays down the application of the lend-lease law for the armaments of the European countries.

These permanent instruments and those of a temporary nature, as it were, established by the ERP prior to 1952 (but which will become permanent precisely because they consolidate the situation of European dependency) lay the foundations of the economic and political predominance of the United States.

By means of these instruments and other precise, if not definitive, agreements such as the Havana Charter?, the basis of the American empire is ensured. Even the so-called principles of freedom, of trade, of the transfer of goods and persons, stated in the aforesaid Charter, today represent instruments of the absolute supremacy of the United States economy throughout the world, which is something serious for our Country both in the field of trade and in that of capital investment. In the strictly commercial field it must be recalled that our imports from the dollar area accounted for 19.47 per cent of total imports in 1938, 50.17 per cent in 1947 and 45.19 per cent in 1948, while our exports to the same area are far less important, amounting to 9.78 per cent of total exports in 1938, 5.93 per cent in 1947, 9.49 per cent in 1948. These few indicators could well seem insufficient. However, with regard to the economic penetration of the United States in general I think little else needs to be said beyond confirming the opinion held by the man in the street who has seen our Country invaded by Coca Cola and the domination of American films without any defence by our industry, and the widespread presence of de luxe automobiles which did not exist previously.

It is against this precise background that this Treaty must be viewed, a new, permanent instrument in the conventional form, if you like, of a treaty of trade, navigation and friendship; in other words it is formally different from what clearly emerges at first sight from the bilateral agreements established in the ERP legislation, according to which we wholly accept an internal law of the United States, namely, the law of 3 April 1948.

Although this treaty appears to be a conventional instrument it is different in its substance; in its spirit it represents a new, albeit formally conventional, instrument, an instrument which, together with the others, serves the purpose of guaranteeing the predominance of the United States over our Country. And I am convinced that also the Rt. Hon. Campilli, even though he uses in his report those words which would be suitable just for his voters — who will perhaps believe them, as they believed them on 18 April — referring to the equality of rights between the two parties, to friendship, etc., I believe, I repeat, that also the Rt. Hon Campilli basically agrees with me (because I consider him an intelligent person) that here we are establishing an instrument that does not guarantee equal rights but which sanctions a substantive inequality between the two countries and thus guarantees a privileged position for the United States.

Moreover, whence comes this frantic desire of the United States for the freedom of trade, of settlement, of the movement of persons, goods and capital, precisely in a country which is historically known for its pronounced protectionism, for its savage customs tariffs. The history of the trade policy of the United States is well known: there is no need to describe it at length: it is the history of protectionism itself.

Suffice it to mention the customs tariffs, such as those laid down by the 1890 Kinsley customs law or the even more serious Hawley Smoot law of 1930 or the trade policy of supporting the companies set up by the oil and steel trusts for the purpose of penetrating the European markets, particularly that sanctioned by the 1918 Webb Pomerane law abolishing the anti-trust legislation in the case of these trading companies. Foreign trade has always been considered in the United States as a matter of national interest, a public, not a private concern. And how many institutes have been set up to encourage exports, that is, to create opportunities for the penetration of world markets! Only now has this frantic desire for the freedom of trade and navigation, for the free movement of persons and capital come to light. But we also find that this freedom is in someone else's house, not at home, that is, that this freedom is merely the expression of the present interests of the ruling class in the United States, that it represents the interests of the United States economy which occupies a position of substantial and undeniable predominance in the world; in other words, it serves the purpose of underpinning the power relations by means of which the weak, precisely by virtue of this freedom, can no longer defend themselves; it establishes equality between the dwarf and the giant. In this connection I should like to tell a story which may present the issue in a somewhat lighter vein, even though I am not a good storyteller. It is about a man who made canned lark's meat. When asked how one could possibly make canned lark's meat, he would answer that it was really not just lark's meat but also horsemeat — half and half, he would say, exactly half horsemeat and half lark's meat. This is the kind of equality that is being established. This is the freedom that the United States is demanding today — the freedom of the stronger party. What I am saying also refers to other cases, honourable colleagues, particularly the Rt. Hon. Campilli and Togni who are concerned also with the Customs Union with France. Today, in this age of monopolies, the conventional instruments used to prevent the penetration of foreign goods change in meaning. Customs tariffs become less important because they are replaced by agreements between monopolies, between groups — between the groups, for instance, of the French steel industry and the Italian steel industry, between the *Comité des Forges* and *Compsider* — that is, agreements fixing the quantities and the sales markets and limiting trade with a greater benefit for the monopolies than with conventional customs formulae. Because, when the customs tariffs were in force, part of the revenue at least went to the State, which could then distribute it to the various categories of citizens according to the expenditure made by the State itself.

Today monopolistic groups make agreements amongst themselves and retain also that part which should go to the State as customs duties. But this does not change the substance, the fact that international economic relations are regulated according to the power relations existing between the monopolistic groups.

How can we defend ourselves in such a situation? By reasserting freedom, equality, that is, by spouting words that we could not believe if we were intelligent persons? By trying to deceive us, to deceive the Italian people, whose interests we should be defending, or instead by examining the truth carefully and trying to find suitable instruments to prevent this substantial inequality from weighing too heavily on our Country's economy?

But there is still one further aspect of a general nature. When a treaty is presented like this one, that is, so broad in scope as to place foreign persons and companies on an equal footing with national ones, when it becomes a treaty of settlement, of establishment, as a result of which — as we shall see more fully when the articles are examined — foreign citizens and companies can establish themselves in our Country, carry on commercial, cultural, political and informative activities, that is, carry on all possible kinds of activities, this treaty then becomes a political treaty.

This is a new principle, which is not found in the other treaties. That is, it is not true when the report says that this treaty does not add anything new; there is one important and very new fact that is not contained even in the treaties Germany established with Romania and Czechoslovakia (because those treaties contained a most-favoured-nation clause), namely, equality was established with foreigners not with nationals.

I do not wish to argue in abstract terms . . ., for instance, from an abstract point of view be an acceptable principle to establish something new, which would facilitate economic relations between the various countries. However, honourable colleagues, when we accept such weighty and serious clauses, I repeat, we transform a treaty of navigation and trade into a political treaty. In the first place, it is not true that there are no specifically political clauses, in so far as the clauses allowing cultural, religious and political activities are an expression of just this. From a general point of view these clauses may not even raise any problems: it depends on the possible extension given to such activities. The sect of the Mormons might spread, and I think that some of my colleagues present here would even not mind that; that horrible publication known as the *Reader's Digest* could spread. These are details. It is the principle that counts: that is, when these rights are summed up, we necessarily come to deal with a political content of a constitutional nature, I should say, which therefore calls for an examination of what constitutes the juridical and political system of the two countries party to the treaty, as well as their current policy; only in this way can the effective existence of the alleged equality of the two parties be established. When this great novelty of the settlement and equivalence of foreigners to nationals is introduced, this principal must be examined from the juridical and substantive points of view, which is something that can be done, I repeat, only by examining the juridical and political systems of the two parties. As far as the substantive situation is concerned, I do not believe that it is necessary to insist for very long. I think it is clear that even if from the juridical standpoint the provisions contained in the Treaty represented an effective equality within an equal juridical system, no Italian capitalist would be able to export capital to the United States, that is, to compete with General Motors, United Steel or Standard Oil. There are obvious substantive differences which therefore lead to inequality.

We shall see that there is a single point in which this inequality could be partly compensated for, which was represented precisely by the possibility of Italian workers settling in the United States and thus carrying on their working activity there. But there is no provision for this not only in the juridical system of the United States but even in the treaty itself; however, this already comes under the second part of the inequality represented by the different juridical system and not in that represented by the substantial difference between the two economies.

But when we examine a Treaty, I say, if it contains clauses whereby a foreign citizen of the other party to the treaty is equated to a national and foreign companies are equated to national companies, we must consider the juridical system and the actual economic policy of the two countries that are party to the treaty.

In either case, that is, considering the juridical system of the United States and of Italy or the actual policy of the United States Government and of the Italian Government, we see that our Country is in an obvious state of inferiority. When more than one article of the treaty makes reference to morality (a word with perhaps little juridical significance) and to law and order, it must be remembered that this law and order is not only that which is dear to the Minister Scelba, but law and order in the broader sense which, in juridical terms, means that no provision of the contract can clash with the set of juridical institutions of that country. Therefore, it does not concern, for instance, only the refusal to allow entry to the son of the President of the Republic, guilty solely of wishing to attend a peace congress and of sympathizing with the party which intends to defend peace with determination. This may be the Scelba type of law and order, but there is also law and order in the juridical sense, established by the sum total of juridical institutions which exist in the United States.

And it is precisely for this reason, I say, that this kind of treaty becomes a political treaty which compels us to consider the juridical institutions of the individual countries party to the treaty and at the same time also their actual policy; when the Government of the United States decides today, for example, that the son of the President of the Italian Republic cannot go to a peace congress in the United States (which is only just, in so far as it would not be just for Giulio Einaudi, simply because he is the son of the President of the Italian Republic, to be treated differently from any other foreign citizen), it is nevertheless performing a concrete political act.

In this connection we have not got the laws that the United States have, by means of which the clauses laying down equality of treatment between nationals and foreigners can be rendered ineffective, the settlement of foreign citizens can be prevented and all the activities of foreign citizens can be prevented in so far as they are un-American activities. If in the United States one succeeds in discovering that the Americans themselves are un-American, to the extent that they are brought before the Federal Court for un-American activities, there would be no difficulty in preventing foreigners from carrying on any sort of economic, political or cultural activity . . .

Togni: This is a judgment of intentions!

Pesenti: No, of reality, because this is how things really stand. Perhaps permission will be granted to a cheese manufacturer who causes no bother (for instance, a producer of parmesan or gorgonzola cheese) to go to the United States to do a bit of business, perhaps in a joint venture with an American industrialist. But the large-scale activity provided for in general terms in the treaty, the equality, the equivalence, will not only be substantially to their advantage, because only they will be able to come to Italy to set up companies, create industries and carry out oil prospecting, while it will certainly not be us who go to the Pennsylvania or California fields to prospect for oil or to compete with Ford, but it will also be to their juridical advantage because they will be able also juridically to prevent any activity of an economic, cultural, political or religious nature being carried on by Italian citizens.

The basic difference in the institutional juridical nature of the two countries, which is mentioned in several places in the Treaty, when it refers to norms that do not conflict with law and order (the Scelba type of law and order which is very well known in the United States since that is precisely where the riot police and tear gas bombs come from) acts against us by being added to a long series of contingent policy restrictions which can also be enforced against foreigners. Our present Government is well aware that it implements this contingent policy against its own citizens but it does not want to do so against foreigners, not only those from other capitalist States or the Ustase, particularly if they come from the star-spangled republic.

The Government we have gives us no guarantee in this regard, not only because of the lack, in our Country, of juridical institutions suitable for defending us, but also because of its contingent policy. I have no wish to criticize the United States juridical institutions; they are the product of their history just as ours are the product of our history. The fact is that we have no guarantees for the juridical system and we have even fewer guarantees for the concrete policy implemented by the Government now running this country.

And we who are above all defending our Country's interests cannot overlook the fact that the foreign policy of the Christian Democrat Government has already been censured in a few words by Vittorio Emanuele Orlando who referred to them using the terms greed and servility *(Interjections — Protests from the Centre).*

In the face of such a situation, of this inequality established in the Treaty, from a point of view which is not only substantial and relative to the economic conditions of the two countries, but also from the formal point of view of the juridical institutions, and thus from a juridical point of view, we detect a different attitude in the two Governments: the Christian Democrat Government has in fact shown on several occasions that it is incapable of defending the interests of our Country against the United States.

In such a situation it is clear that we cannot agree to ratify a treaty like this because, in addition to all the conditions of inferiority it establishes, there is also the lack of confidence in a government activity that could partly limit this condition of inferiority, that could take advantage of what is represented by the additional protocol — which establishes several, albeit temporary, compromises (but it is a known fact that temporary situations last much longer than those considered permanent) — that is, the set of rules which can partly offset this inequality of a substantial, economic and juridical nature.

We have no confidence. The inequality between the two parties to the treaty is clear and obvious in all the articles which, in view of the late hour, I certainly do not intend to read, although perhaps some of my colleagues, who have had full, acritical confidence in the Government, have probably not even read them, as they know that the duty of the majority is to vote in favour of the Government. Therefore, perhaps, also a reading of the individual articles would not be a bad idea for some of these colleagues; however, I do not wish to afflict the few that are present, also because I believe that there is no point in forcing people to feel responsibility for their actions when they do not already feel it themselves.

Suffice it to refer to Article I, which contains the most important provisions: the possibility of carrying on commercial, industrial, processing, financial, educational, philanthropic and professional activities, except the exercise of the legal profession; the possibility of purchasing, owning and constructing (I should like to see how many Italians will go and build in the United States), to use agents and employees of their own choice, without regard for their nationality (they will probably be armies of spies). I repeat, what have we to use against this Article I, which continues into Article II, establishing the same privileges, the same rights, for companies; it continues into Article III, which emphasizes the section referring to the carrying on of industrial, commercial, philanthropic and religious activities? What have we got to offset Article IV, which establishes the possibility of carrying out prospecting with a view to exploiting mineral resources?

Lastly, Articles V and VI lay down the norms governing the transfer of property; Article VII presents an odd difference of treatment because the citizens and juridical persons and associations of each other party to the treaty will have the right to purchase, possess and dispose of real estate or other real rights in the territory of the other party to the treaty on the following conditions:

(a) in the case of citizens, etc., of the Italian Republic, the right to purchase will depend on the laws and regulations which are or come into force in the future in the United States of America;

(b) in the case of citizens and juridical persons of the United States of America, the right to purchase, etc., will be subject to conditions no less favourable than those granted or to be granted in future to the citizens and juridical persons of the Italian Republic, etc. This is, therefore, a difference also of a juridical nature established, sanctioned, by Article VII, between our citizens and those of the United States, that is, a condition of inferiority of our citizens vis-à-vis those of the United States.

And the series of articles continues in the same tone. As I have already said, no treaty has ever established such a high degree of favour for foreigners. Not even the Treaty between Germany and Romania and Slovakia before the Second World War. Our Treaty of Navigation and Trade of 1871 was much more prudent; its provisions did not extend to settlement and it provided a better guarantee of the interests of our Country.

At any rate, what is the only substantial benefit that we could have obtained from the substantive point of view, assuming that is that the United States legal system did not have the notorious Alien Act? The only benefit would have been the possibility of migration to the United States for Italians who, even if they unfortunately could not go there and set up companies in competition with the *Standard Oil Company*, or to carry out oil prospecting, or perhaps even to carry on cultural or educational activities (except in the case of a religious congregation), could at least have gone to the United States to work.

The only benefit was the possibility of our millions of unemployed going to the United States and finding there an opportunity to work, to live, to make a future for themselves. And yet this possibility has been prevented; our only possible benefit is unavailable.

And in these very days all my honourable colleagues — indeed this very morning — will have received from the Under-Secretary of State for Foreign Affairs, the Rt. Hon. Moro, a letter recalling the regulations governing migration to the United States of America. This letter states that migration to the United States is rigorously governed by the restrictive law of 1924 which allows only a limited number of Italians to settle in that Federation each year.

The places not filled in the so-called preferential categories, which are limited to a few hundred per year, represent the isolated preferential quota, etc. This is followed by the list of documents required for this migration.

What becomes of this reciprocity of settlement when we are deprived of the only possibility of settlement open to our Country? Clearly this clause favours only the interests of the United States, so that the "Metro Goldwyn Mayer" can carry on its activity in Italy, purchase and own, using the profits deriving from the fact that Italian citizens are compelled to see not only the good films — which would be useful — but also the horrible films of the United States, and of political propagada related to the so-called cold war, like "Iron Curtain", etc. I have given the example of a film company, which is obviously likely to cause less trouble than others, because even if it buys a building or two, these are unlikely to be taken out of our territory.

But where is the equal footing, the equality, mentioned in the ministerial report and in that of the Rt. Hon. Campilli? Does the Rt. Hon. Campilli really believe in it? I have faith in his intelligence and believe that he does not: the inequality is quite clear, obvious. This treaty cannot be considered a treaty of equality, between equally sovereign countries, that is between countries defending their reciprocal rights with equal vigour; I would call it an "open door" treaty of the kind that more powerful, imperialistic, countries — such as Great Britain and the United States — are, or were, accustomed to establishing (and let us hope they will be unable to continue to do so) with China and Turkey at the time of their greatest decline, that is, with countries they deemed to lie in their own sphere of colonial or semi-colonial influence.

We cannot accept such a treaty; and we have all the more reason for not accepting it in so far as the present Government is doing practically nothing to make up for this state of substantial inequality. We cannot have confidence in a Government which supinely, without discussing it, accepts all the initiatives proposed by the stronger country, the United States; we cannot have confidence in a Government that does not accept discussion, which out of servility is always unwilling to impose controls and restrictions on the invasion by American capital, to impose substantial controls and restrictions on the intrusion of United States companies and citizens in our Country.

In other words, we have no confidence that the Christian Democrat Government can and will defend the interests of our Country in the same way as the United States defends its interests. But precisely because this instrument *per se* represents another link in the chain that is to bind the American world together and of which no country is allowed to shake off, that is, precisely because it is another link in the chain represented by the Bretton Woods accords, the Havana Charter? and the ERP agreements, and of the Atlantic Charter in the political field, precisely because this instrument sets out to sanction the inequality, the disparity, between the two parties thereto and does not defend the interests of our Country, precisely because the Government running our Country is not capable of defending the national interests and is unwilling to do so, for this reason we cannot recommend the ratification of this treaty and invite all our colleagues to refuse to ratify it *(Applause from the Extreme Left)*.

Chairman: The rest of the discussion is postponed until tomorrow.

Document 6

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DEBATES, SESSION OF 25 MARCH 1949, PAGES 7427-7441

[Italian text not reproduced]

CONTINUATION OF THE DISCUSSION OF THE DRAFT BILL: RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND THE EXCHANGE OF NOTES, AGREED IN ROME, BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948 (246).

Speaker: The item on the agenda is the discussion of the draft bill: Ratification and implementation of the Treaty of friendship, trade and navigation, of the Protocol of signature, of the additional Protocol and of the exchange of Notes agreed in Rome, between Italy and the United States of America, on 2 February 1948.

The next speaker is the Rt. Hon. Montini, who has the floor.

Montini: The Treaty of Friendship, Trade and Navigation between Italy and the United States of America, and the relative protocols, have already been amply discussed, first by the Committee for Foreign Relations and subsequently by the Committee for Treaties.

An objective examination of the Treaty from a negative point of view has already been made quite thoroughly by the Rt. Hon. Pesenti. Here, however, it is not a matter of discussing single points, as if the intention were to introduce possible modifications, but to decide "for" or "against" ratification.

From the historical point of view we are more or less in the same position as our colleagues in 1871, when the first ratification of a Treaty between our Country and the United States of America was being discussed. Precisely in that period a previous treaty agreed in 1838 was about to expire and Parliament was being asked to ratify the new treaty, which was ultimately signed by the Minister Visconti Venosta.

At that time the Minister had to defend himself because the opposition, which was lively also in those days, pointed out that the treaty did not safeguard a perfect reciprocity of rights; this was a somewhat similar position to that of today in that the fundamental objection made by the opposition is indeed the possibility of a lack of reciprocity between our Country and the United States.

It is interesting to see from the documents of the time how the proposing Minister had to defend himself against the reservation made by the United States of the right to coastal shipping, the right of river navigation and of the conventional tariff.

This is what the Minister of the time said:

> "This is all that we can ask of the United States in the meanwhile in so far as the parity that we are demanding is perfectly comparable to that of all the other States that are negotiating for the United States."

"Therefore", declared the proposing Minister at the time,

> "the fundamental overall position is as follows: either not to perform an act of peaceful negotiation with this nation or else to merely withdraw from the 1838 Treaty and remain in the position of not having any relations with the United States themselves".

Also today the discussion could be summed up in these terms: either to ratify or not to ratify. By ratifying — and I shall momentarily accept your overall argument — we do not obtain everything we want, we obtain less than what might be considered desirable. But, if this is your argument, it is no less true that ratification would in any case bring considerable benefits.

The opposition's objections however refer also to another point, namely, that it is not a protocol restricted to the regulation of trade and navigation relations and which remains within the narrow confines of the technical regulation of economic relations, but consists of a Treaty which is extended to cover a much larger sphere involving also the establishment of positions of friendship, thus entailing relations which are more than technical in scope and in which the opposition detects a political aspect.

It is very strange that such objections should come from this quarter. Since 1871 the general political situation has changed considerably and a different approach to internal relations and relations between States has developed historically. What in those days was merely a simple technical relation based on the principles of a liberal State must now be revised because the conception of State has changed completely; and since the State has constitutionally expanded its internal functions, so we now find ourselves in a different position also vis-à-vis the conception of relations between States. Today the 1871 Treaty can be said to regulate too little; of the present one we certainly cannot say that it regulates too much! Much progress has been made; suffice it to consider the large number of relations which regulate the life of States and the need for them to cultivate and accept relations of solidarity, in order to observe, in the course of history, that just as the means of transport, cultural relations, etc., have expanded, so it is necessary to predict and regulate increasingly broader areas of contact between States. We must decide whether it is necessary to stop short at the part strictly envisaged in the Treaty; from the historical point of view we consider that this Treaty is not only not a bad thing, but that it is a good thing, although (perhaps) not as good as we might have hoped for.

At the Committee level, the opposition has drawn our attention to another point: the technical point of view. During the discussion before the Committee a number of objections were raised concerning the issue of establishment, and it was pointed out that, while the Treaty states that "Equal conditions are recognized for the free exercise of the professions, except the legal profession", in actual fact United States legislation and practice would imply a deficiency of application because the legislation of the individual states making up the Federation would count as restrictive clauses to the broader scope granted by the Treaty.

We reply in the first instance that, in the states of the Union, wherever a restictive law is in force, the applicable law is more likely to be not the restrictive one but that of the Federation and in any case what should or is at least likely to occur is that the local laws, which could be less restrictive today, will gradually decline, possibly with the help of the Treaty itself.

If the bases provided by the Treaty ultimately increase the range of possibilities, it must be accepted that the Treaty itself can lead to possibilities which hitherto were excluded. Also for this reason it is obvious that, faced with the question of whether to ratify or not to ratify, it is better to ratify. Even if we were to think that in the internal practice of the United States a current limit to application existed, we cannot help believing that the Treaty is likely to increase the possibilities rather than reduce them. Therefore either we remain inert and do not ratify, or by ratifying, we try to open this door wider than it has been opened so far.

The "most-favoured-nation" clause expressly included in the Treaty and which refers to both trade relations and all other kinds of relations, is a clause which existed in the preceding 1871 Treaty; therefore the present Treaty neither innovates nor improves the question with regard to this point. This is the observation made by the opposition. We reply that if you do not ratify the present Treaty this favourable clause is lost; it disappears.

Therefore, if we take an absolute negative view, we shall not have the advantage even of the positive aspect, that is, of this clause, which is recognized by everyone as favourable.

From the substantive point of view, the observation made by the opposition is the following: the perfect reciprocity glorified in the Treaty does not in fact exist; in so far as the treaty with the United States remains a symbol — to use the words of our colleague Pesenti addressed to the Foreign Affairs Committee — it represents a symbol of reciprocity and equality, but the substance remains unaltered, namely, a state of inequality between the two countries. And this inequality cannot be corrected by the Treaty. My answer is that before speaking of inequality in juridical terms it is a good idea to observe the bases of the discussion. And in this connection we have not heard and will not hear any serious objections concerning the reciprocity of rights between the two States party to the treaty. Perfect reciprocity means that Italy is on an equal footing with the States that have dealings with the United States, and that privileges are not used to breach the equality between the application of the internal Italian legislation and the application of the internal United States law, which forms the basis of the equality of rights.

Reciprocity, in so far as the United States treat us as they treat other nations, with the advantage that in some cases our position is more favourable. Parity, in so far as the respective citizens of the two countries are not subject to *a priori* limitations. Therefore, in the sphere of law, no inequality exists.

In the practical sphere the question of substantive inequality is taken to mean that the Treaty is blamed for the fact that the greatness of the United States, its financial power, the position of its capital, could become a means of supremacy vis-à-vis our weakness and shortcomings; in other words, this situation would be a fault, in that any nation negotiating with the United States would be negotiating with a stronger party. And the Treaty is blamed for not correcting this defect. But how can a treaty correct such a state of affairs? If we negotiated with the Republic of San Marino, as we do, would this very fact entail a perfect substantive reciprocity between the Republic of San Marino and Italy? The observation would seem so obvious that its logical meaning cannot be overlooked! So that of course if we negotiate with the United States we shall not demand equality of resources, aid and activities but a line of respect of rights and dignity. And we could well fear — if that is the right word — that the United States capital entering Italy affects our economic and financial positions.

But also on this point we must be careful not to reach negative conclusions because, either we actually do fear that any entry from abroad of foreign capital into our Country is dangerous, and therefore what we unconsciously wish to maintain is a state of autarky; and we are still suffering from the terrible consequences of him who gave us autarky! Or else we view the matter with a greater sense of realism and say that the entry of foreign economic resources into our Country must be discussed very carefully and the decision ultimately taken as to where to situate our independence and our dignity. In other words, if we fear that the action of foreign capital and foreign economic resources affects our independence and our dignity, we should be placing both very low down on the scale for our Country. We know, however, that it is not by using material resources that independence and dignity can be affected. And were it legitimate to broach another matter in addition to that of treaties we should consider the fact that the aid we receive from the United States is not received by treaty, not for the above technical considerations or through a specific foreign policy, but we receive them through an act of international solidarity, which has no effect on our dignity or independence. No aid, no good, from whichever part it is received will affect the sense of inner freedom, the sense of dignity, as a result of which we are people who beg their bread in the morning without considering that at the end of a day's work we have produced as much as is required to give it back, and to have retained our dignity and independence.

This is basically the history of the last three years of our lives. Everything we have received from the United States — and this is a matter which is not clo . . . matter which obliges us to judge relations with other States — can be assessed as being worth millions and millions of dollars. All the reconstruction work (reconstruction of bridges, roads, railways, etc.) has been done by us, even if the material resources mostly came in the form of external aid. The aid we have received in this connection perhaps exceeds that granted to other countries, but if this aid is materially accounted for it can be seen that the capital now invested in our Country can be multiplied about seven-fold.

This means that one can be independent, not tied to any form of aid that entails loss of dignity or independence. I remember when in northern Italy we used to travel on "Belgian" railways and trams; I never felt that my dignity or freedom was being diminished by the fact of purchasing a ticket with "Belgian Tramway Company" written on it. Those railways and trams have continued to function up to the present time even after the original capital had been paid back and today no one can say that it has affected our independence and freedom.

The Treaty has been criticized because its provisions will have very little effect on migration. It is obvious that we are more likely to receive capital from the United States than the chance to place emigrants; and yet we were very interested in sending Italian labour to the United States. Also on this point shall we hear the opposition complain and demand that the Treaty modify this state of affairs concerning us? But also on this point we must point out that the Treaty lays firm juridical foundations; as for the actual facts we should perhaps negotiate special treatment for Italy vis-à-vis other countries and not conditions of equality. If this becomes possible in future, the Treaty will not prevent us from doing so; today in any case we have conditions of fairness.

I believe, therefore, that the position from which the Treaty is asked to correct fundamental differences is utopian and unconvincing.

For these reasons it can be concluded that the *a priori* objections raised by the opposition are unjustified. I do not know whether the opposition will raise the same objections to every treaty brought before the Chamber. Probably the logic of your opposition will lead you to adopt a hostile attitude to every treaty the Government brings before the Chamber for ratification; however, I maintain that if this is the general *a priori* condition, it has no particular significance in the case in point, unless too close a connection between a judgment of general relations between West and East has an effect also on this discussion, which would continue, outside its forum, the discussion carried on by many speakers in the last few days before this Chamber. The opposition will always be the opposition; this is in the nature of things; however, I think that when, in the near future, we bring the

Treaty with Russia here, either the opposition will have to change its present compulsory behaviour or else it will have to admit there is no difference between this treaty and that one. If there is any difference at all it consists in the fact that in that Treaty (the one with Russia), one goes even further, opening up lines of solidarity which do not keep to the strict juridical concept of the international treaties of the past.

In view of the aforegoing, I therefore consider that neither for historical reasons, nor for reasons of treaty technicalities, nor for substantive reasons, should a negative opinion be cast against ratification.

As it is not necessary to discuss the individual clauses, but only to decide between "yes" and "no", the position of the "nos" seems to be quite unjustified, while we should like to express our approval of ratification of the Treaty *(Applause)*.

Speaker: There being no further speakers on the agenda and no one else having asked the floor, I hereby declare the general discussion closed.

The honourable Rapporteur for the minority now has the floor.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: It is true that there was a discussion before the Foreign Affairs Committee and the Treaties Committee, but it is also true that there was a certain tendency, particularly on the part of our colleagues of the majority, to gloss over a detailed examination in Parliament. If a colleague of the opposition had not taken the floor concerning the Treaty yesterday we should probably not have had any discussion except for the report of the majority and that of the minority.

I wonder why this should be so? Some colleagues have said: we have already performed an important political act which basically incorporates in its broader framework what we are called upon to perform today. We have already made a decision concerning the Atlantic Treaty, and today the Treaty of Friendship and Trade with the United States represents something of lesser importance, in a certain sense, something complementary. But what has the Atlantic Treaty to do with this? In the past we have had other political treaties, and military accords: the Triple Alliance, for instance; but when it came to discussing the treaties of trade with countries such as Germany and Austria, Parliament discussed them in detail. The States of the Triple Alliance also had a political and military accord, but all my colleagues know how long the discussions were in the French and British Parliaments concerning the treaties establishing the trade relations between Great Britain and France, or between France and Russia. It is therefore difficult to explain and understand why this Treaty is not viewed as a pact in its own right, but is viewed as something important, undoubtedly very important, but which it is not considered useful to discuss in detail because the discussion is already included in the parliamentary debates conducted for the ERP Convention, the bilateral Pact and, lastly, on the Atlantic Treaty.

Or else, another hypothesis must be advanced which unfortunately seems to be grounded on fact, and in a certain sense the colleagues of the majority who support it are justified: namely, this is actually a special treaty and not something independent, completely independent, of the political agreements we have negotiated or are about to negotiate with the United States, of the special economic agreements undertaken earlier. No, this Treaty is something complementary to the ERP Convention, the bilateral Pact and the Atlantic Treaty.

These are the grounds of our objections. Our colleague Montini has just spoken of an *a priori* position assumed by us. I should like to be very clear in this connection. Our position vis-à-vis trade treaties signed with the United States, Great Britain or Russia, with any other State, can on the whole only be favourable. Our Country is a country devastated by the war, by the defeat to which it was led by the fascist régime; a country which, particularly for its economic recovery, needs to resume its trade relations, its exchanges with all the other countries.

In the reciprocal interest of Italy and these countries therefore we must, we should negotiate treaties. Indeed we are particularly favourable to this kind of relations because they open up the give and take ledger in full independence.

Trade treaties should always be favourable, like any other commercial transaction, to both parties to them. This is the fundamental principle. Each treaty, therefore, should also contain a point in favour of Italy: the more points there are, and the wider their scope, the better.

We are favourable to these treaties as a general rule, with any country they are negotiated with, provided they are agreed in the Italian national interest, provided that they strengthen or are expected to strengthen our national economic independence.

Our objections to the Treaty we are called upon to discuss today are of a different nature precisely because of the different nature of this Treaty.

If the Treaty with the United States were purely a trade treaty, negotiated in the reciprocal interest of both parties, we could not raise any *a priori* objections here. We might question several clauses, as may be discussed in every treaty, but we should be obliged to declare our overall approval.

However, in actual fact we are opposed to the specific text of this treaty because this treaty is linked to the ERP accords, to the bilateral Pact and to the Atlantic Treaty. It is a complementary treaty to the overall accords we have agreed to with America: this is what gives this treaty its spurious, peculiar, political nature, even though the Rapporteur for the majority is unwilling to admit it.

Our colleagues of the majority may perhaps say: All right; in a certain sense this treaty takes for granted the ERP accords. So what? The ERP accords mean aid, albeit given to Italy under certain conditions, and therefore we should be all the more favourable to this Treaty. This is precisely what we are objecting to.

I have here the industrial production indexes for a number of countries. I have taken them from the monthly statistics bulletin of the United Nations published in November 1948. With few exceptions, these indexes are higher for the nations that are not included in the ERP Plan than for those that are.

The index of industrial production for the EIS countries is as follows: Belgium dropped from 96 in March to 85 in July, the UK from 108 in March to 99 in August, France from 112 in March to 104 in September.

Campilli, Rapporteur for the majority: But are these the latest figures?

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: I shall listen to yours later. There has been an increase in the German and Austrian indexes because it is part of the ERP Plan directives to develop the German industry for the purposes of which we are all aware. But if we take the indexes of industrial production referring to the East European countries — and note that I have again taken the figures from the United Nations statistics bulletin — we see that the indexes increase appreciably over the same period, and these are countries which do not receive the so-called benefits of the ERP convention.

For instance, Bulgaria rose from 158 in March to 192 in July, Czechoslovakia from 99 in March to 102 in September, Poland from 150 in March to 157 in August. As far as the Soviet Union is concerned, industrial production in the third quarter of 1948 is found to be 123 per cent that of the third quarter of 1947 and 155 per cent of the third quarter in 1946.

These are the figures. Therefore, also, your claim that it does not matter whether it is a trade agreement or not, or a pact complementary to the ERP accords or not, since it is in any case an agreement which favours Italy on the whole can, in our opinion, be challenged. And it can be challenged for other reasons as well; because the characteristic of this treaty, which distinguishes it from all other treaties of the kind, is that it entails a certain degree of limitation to our trade with other countries. This is the point to which I wish to draw the attention of the Chamber. It is true that the United States have on several occasions declared that, while they intend to control exports towards Eastern Europe and the USSR, they have no intention of preventing them. In actual fact, I believe that the Rapporteur for the majority will agree with me that in 1948 trade between the Marshall Plan countries and the East European countries and the Soviet Union was very small indeed. If we take seven countries . . .

Campilli, Rapporteur for the majority: Take Great Britain.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: I shall take the trade between the Western European countries, all the Western European countries, including Great Britain, with seven countries of Eastern Europe: Bulgaria, Czechoslovakia, Finland, Hungary, Poland, Romania and Yugoslavia. The figures for 1947 come to 44 per cent of those for 1938. Trade between East Europe and the Western European countries came to less than 33 per cent, that is, less than one-third of the 1938 figures.

And we shall immediately see what the reason for this is when we read some very recent news items, dating back to two or three days ago, which will show us the general character of trade agreements with the United States. Take for instance the item in the *Bulletin of the State Department*, that is, of the United States Ministry of Foreign Affairs, of 23 March — that is, two days ago — which informs us that the Government of Belgium — one of the countries most respectful, as it were, to US economic and political discipline, one of the Benelux countries, which the Americans generally consider as the countries most committed to their economic, political and military plans — well, Belgium has been fined 605 thousand dollars, that is, 360 million lire, by the State Department, for having purchased crude oil last year, not in East Europe, not in Romania, for example, not in Russia, but in Venezuela, that is to say, on American territory. On the basis of the ERP economic accords, the ERP administration considered this sufficient grounds for declaring a breach of the treaty and responded with economic sanctions.

Another news item from the day before yesterday was published in the Paris edition of the *New York Herald Tribune*: France and Poland have a trade agreement according to which Poland supplies coal in return for French manufactured products. Therefore, in order to receive Polish coal, France exported machinery. An American daily has reported the fact and announced that Marshall Plan officials will carry out an inquiry with a view to taking measures (for the time being economic sanctions) for what the United States considers a breach of the Treaty also by France.

It is therefore evident that we are dealing with extremely peculiar economic treaties, which are so bound up in an economic, political and military chain that they necessarily constitute a limitation of normal, independent economic development in the signatory countries (in this case Italy) in their free trade with the other countries in the world. These economic limitations are obviously also political limitations which lead our Country to adopt a policy such that it ultimately signs treaties of this kind, chaining itself to a given foreign policy leading to certain consequences on which I shall not dwell as I do not wish to repeat the argument we had several days ago over the Atlantic Treaty.

Furthermore, also in the case of Italy there have been limitations of this kind. I wish to ask the honourable undersecretary: is it true or not that the EIS has banned the exchange of Romanian oil for Italian machinery? The information I have is as follows: the United States intervened to prevent this favourable exchange for Italy. This is today's intervention; what will those of tomorrow be like? We cannot tell. It is true that there exists a trade treaty with the Soviet Union; but it is also true that we do not know how this trade treaty has been received in the United States of America and to what extent, . . . it begins to be implemented, if it ever is, there will be similar interventions to those over Belgium and the Venezuelan oil or those over France when Polish coal was bartered for French machinery. However this may be I can only cite these facts to show that this Treaty has peculiar features and that it is these peculiar features and not an *a priori* judgment which have led us to oppose it.

Moreover, it would seem that these peculiar features have been noted in a number of quarters with regard to economic agreements with the United States. I shall not cite a large number of facts here. Suffice it to recall the position of Austria, of the Austrian National Bank, which has protested against EIS financial policy, which is causing inflation in that country. There is concern in Austria because trade relations between Austria and the United States based on the ERP accords threaten to limit production in the large Austrian factories, that of Steyr, for instance. This factory is unable to work at full capacity and the Marshall Plan envisages the importation of 20,000 American trucks by Austria!

Even in Turkey — and Turkey is a country that, for a number of politico-military, rather than economic, reasons has been greatly facilitated — the Turkish National party, a centre-right party that in no way shares our general position nor our ideas on internal policy, has raised objections against the economic consequences of the ERP Plan, which stands in the way of part of the Turkish exports and above all worsens the economic situation in the rural areas. Concern has been expressed also in the Benelux countries.

You will say that these are the negative aspects. To our mind these negative aspects are serious and weighty, perhaps not so much as regards the present but for the future, as has been the experience in other countries.

Futhermore, also economic aid is beginning to be adversely affected by military supplies.

You are all aware of the discussion which took place two or three days ago before the Foreign Affairs Commission of the United States Senate between the Chairman of the Foreign Affairs Commission, Connally, and several senators having considerable influence on US foreign policy, such as Vandeberg and Taft, who declared themselves in favour of reducing ERP aid to Europe on the grounds of the huge amount of military aid due under the lend-lease law; they said that the United States cannot bear the cost of this military aid involved in the lend-lease law and also go on with the ERP economic aid.

Therefore, also the positive aspects — if there are any in the economic aid provided by the United States in accordance with the ERP convention — will without any doubt tend to diminish in the months to come and we will have to bear the full force of the negative aspects, which are those that I have described earlier and which stand in the way of the autonomous and direct development in all directions of the economic and commercial life of our Country.

After these general remarks let us have a quick look at the Treaty as it stands.

The most serious and weighty remark made yesterday by our colleague Pesenti in his address, on which the Chamber should meditate, is that even the trade treaties with Hitler's Germany with the Danubian countries simply contained the most-favoured-nation clause; they did not go so far as to establish for the Hitlerian nazis in the Balkans the same treatment as for the nationals of the Danubian countries. This clause, which does exist in this Treaty, is truly something new, a new fact in the history of trade relations between countries, as well as being a serious political fact which reveals the nature of this Treaty.

I shall not dwell at length upon this point. I am sure that here, in a political assembly, each person can draw all the required consequences from the statement of this fact.

The Rt. Hon. Montini, who has just spoken, told us that we are in the same situation as our 1871 colleagues. I do not think there is any similarity with the America of 1871, which had just come out of the Civil War, which was still inspired by the political principles of the great Abraham Lincoln and was a true symbol of democracy and progress in the world, and the imperialist America of today. There is no similarity between that America and between that Italy which had just come out of the war of unification, of liberation and in which there was a coalition of progressive forces to which, after all, also the democratic extreme left participated indirectly in some form or another, no similarity between those parliamentary debates (Honourable Montini, you have been to see the texts of the documents of the past and you must have noted how wide-ranging and substantial the debate was at the time) and the way we are discussing this Treaty, no similarity above all between the economic and political content of the 1871 Treaty and the content of this one. The 1871 Treaty was one of the milestones in the economic life of a Nation that, unified at last, was beginning its life in Europe and the world. Today's Treaty, as I have already said and do not wish to repeat, is a completely different matter.

There are two points in which we have, as it were, encapsulated our opposition and through which we have criticized this Treaty:

In the first place, we have denied that the Treaty is fair and reciprocal and we have denied this, Rt. Hon. Montini, not only because of the difference in the economic potential of the two countries. This is something that could happen not only with the United States but also with other countries. With England and with the Soviet Union there is a substantial difference in economic power but it cannot be reasonably claimed that this imbalance in economic power should be allowed to interfere with the trade relations between the economically weaker and the economically stronger country. This would be wrong. It is not on the basis of this inequality that we have denied the fairness and reciprocity of the Treaty. We refer to other factors which we have indicated concretely: We have said, for instance, that reciprocity is embodied in the fundamental article, Article I, which states that the citizens of each of the two High Parties to the Contract shall have the right to enter the territory of the other party, to reside there and to travel freely over it. This is not the case here. It is not true, nor can it ever be true. It is not true because there exists United States legislation, the immigration laws, which exert a severe control over entry to the United States for Italian citizens for whom parity does not exist. Italian citizens can enter the United States only by passing through the fine mesh sieve of this law and Article I will remain inapplicable. Then we shall see the political implications of this sieve today. On the other hand, the citizens of the United States can come and go as they please in Italian territory because we have not got the same laws as the United States.

There is no need for me here to repeat the facts I have already mentioned in the report.

Even a number of Italian deputies and senators, who wished to go to the United States to visit their families, their wives and children, not for political reasons, have had their application for a visa refused. This is what happened to our colleague Michele Sala, a deputy from Palermo. Yesterday or the day before the same happened to Einaudi, Girotti and others. They were supposed to go to a peace congress in the United States. In the case of our colleague Sala there was not even any political reason at all to justify this. We consider that the political reason is completely unjustified in the case of those who were refused an entry visa to the United States for the purpose of attending the peace congress. It seems appalling that a visa should be withheld from personalities of the world of art and culture simply because they are not in 100 per cent agreement with the policy currently being followed by the United States of America. However, the case of our colleague Sala is even more serious.

Article I seemed to open up wide vistas also for emigration. In actual fact, it has no effect on the situation. This is a feature characterizing the Treaty as a whole. Many of these articles, particularly those apparently more favourable to our country, in actual fact do not change the current situation in any way at all. I shall deal with emigration separately because I think that the considerations to be made are extremely important. Let us take paragraph 2 of Article I which states that the citizens of the two countries — and therefore Italian citizens in the United States — are guaranteed the right to freely exercise their professional activity, except for the legal profession. I have already said in the report that this is not true. The report of the majority states that, under United States constitutional law, international treaties have, as it were, the force of federal laws and therefore their provisions override the legislation of the various states of the Union. This is not so: anyone familiar with US legislation knows that in the policy of Americanization of foreigners, which has been known many years by the United States of America, there is only one law which counts, namely, that migrants must be assimilated as quickly as possible and therefore all migrants must have equal status whatever their country of origin. This is what the law says. It would be impossible to treat migrants of Italian origin differently from Polish, German or French migrants. Therefore this general provision is unenforceable. And it is unenforceable — and here I shall not go into detail — for a hundred other reasons as well. Among other things, the professional associations (doctors, engineers, various technical professionals) are so well organized that they can practically block access to the professions, which they do in actual fact, by any foreigners who do not pass special state examinations.

But these factors may appear to be only of secondary importance.

The fundamental factor which explodes the myth of the criterion of equality is the fact that there exists in America a law, the *Alien Act*, which has no equivalent in any other country in the world. The origin of this law is quite peculiar: it dates back to the time when the United States wanted to break the fetters of colonial oppression, free itself from British dominion and become an independent nation. They brought in a law at that time which was designed mainly to prevent foreigners — specifically the British at that time — from having an influence on the political, economic and social life of their country. This gave rise to the *Alien Act*, which was shaped by the peculiar characteristics of American history.

This ancient law is now being applied for quite different purposes. Every foreign citizen who has dealings with his own country of origin or with organizations or individuals based in his or her country of origin and who carries on commercial, economic, social, political or religious activities not approved by the United States Government or by one of the great trusts is immediately subjected to the provisions of this law: he must register as an agent of the foreigner in the United States. Registration leads to such disadvantages that all concerned prefer to leave United States territory if they can. It should also be pointed out that whenever the Department of Justice accuses a foreigner of not having registered in time he is liable for heavy punishment involving a long term of imprisonment.

This law practically makes every un-American activity (even the term "un-American activity" itself is captious; a special commission investigates un-American activities; not anti-American activities, mind you, which would be understandable, but "un-American" activities) running counter to state interests or to the interests of corporations or individuals liable to sanctions.

You see that in such a situation, reciprocity collapses completely: not only with regard to visas, the right of Italians to enter United States territory or the recognition of the freedom to carry on certain professions, but with regard to activities of all kinds which are not approved of by the United States or by authoritative American organizations. In other words, much more seriously and directly than in the ERP Convention (s. 117 of which nevertheless subjected the agreements undertaken to United States legislation) the agreements undertaken with the United States through the present Treaty and which it is proposed to ratify are solely dependent on the laws and will of the United States of America. This is why this Treaty cannot be likened to a normal trade treaty and this is why the criterion of mutual parity is non-existent.

I should like to mention another fact. Paragraph 2 of Article XII (dealing with social security) states that "in accordance with paragraph 2 of Article XII social security shall be granted to each High Party to the Contract". This is perhaps not very much, but it reveals the characteristics of this Treaty. Anyone who has lived in the United States and is familiar with its laws and customs knows that the concession referred to in the Treaty is completely non-existent. Social security has long since been extended to all foreign citizens working in the United States, in addition to American citizens. It is a measure linked to the policy of Americanization and it would not be possible to grant social security to citizens of one nationality and not to those of another. The Treaty clause makes no difference to the existing situation: when it is read, I do not say by jurists, but by the humblest Italian workman living in America, who knows that social security has always worked like this and always will, it will make people laugh.

This brings me to the last point. Our colleague Pesenti has already spoken of emigration yesterday. Obviously, immigration quotas are what they are in the United States. Today there actually exists a small minority movement which is demanding an increase in the immigration quota. Why? Let us neglect the fact that these requests have been rejected and that the Treaty makes no provision for them; however, the reason why an increase in the immigration quota has been requested has nothing to do with commercial purposes. It is strictly political: this minority, which was beaten in Congress, and which requested an increase in the immigration quota for Italian workers, intended it as a means for combating certain political parties and certain political and trade union groups, and therefore as a means of interfering in the political life of our Country.

I shall mention a single, incontrovertible fact. In the recent parliamentary debate I had occasion to refer to a declaration by one of the members of the ECA Advisory Board, Mr. Johnston. On his return from Italy, he declared that a very considerable sum (about 30 billion lire) should be set aside to aid non-communist trade union organizations. Our colleague Bellavista — and I am sorry he is not here today — interrupted me at a certain stage to point out that although this money was to be used for this purpose (there is no doubt about this), it had been provided by some propaganda office or other, not by an espionage bureau of the United States. I went into the matter very carefully and found out that this was not true. It is the Central Intelligence Service which is to carry out this function, an organization set up under a new law approved by the Commission for Military Affairs of the Chamber. The Central Intelligence Service organizes and manages the entire American espionage system abroad. This agency must give 30 billion to the trade union organizations which combat left-wing ideas, which combat communists and socialists. But the Central Intelligence Service is utilized also in matters concerning emigration policy.

The President of the parliamentary commission, Charles Winson (and as you know parliamentary commissions are far more important in the United States than in Italy), declared that this new law would allow all those persons in a position to pass on important information to the United States espionage service without being subjected to ordinary legislation or having to pass through emigration formalities. This is a peculiar way to conceive of emigration. The emigration quotas remain unchanged while the United States of America open up their doors to those Italian citizens willing to spy for the United States of America, presumably on our Italian State. It is so unbelievable that, unless I was certain of my information, I would not dare to state this here. I understand perfectly that, on the previous occasion, my colleague Bellavista, who was in perfect good faith, did not fully believe what I was saying, but as you see it was even worse. It was not only a matter of giving money from an espionage service to trade union organizations that combat the socialists and communists, constituting inadmissible interference in the internal affairs of Italy. It was something much more serious.

This is how the United States of America want to solve the problem of Italian migration to America! They want to offer the jobless hungry Italians in Italy to work for them, to spy on their behalf, on a mass scale; this has been stated clearly and explicitly in an official declaration by the President of the Commission for Military Affairs. In the face of these facts (because these are the facts that no one can challenge) all the fine words contained in the Treaty lose all their force. I do not know what to add to these sad considerations. I repeat — our opposition to the so-called Treaty of Friendship and Trade with the United States is not a preconceived opposition.

If the Chamber had been presented for examination with a trade treaty containing truly commercial characteristics we should have supported it in the interests of our Country, just as we shall support other trade treaties having such characteristics. But this Treaty is an additional link in the chain with which Italy is fettered, and I can assure you, honourable colleagues, that there is not a shadow of demagogy in my words. This chain is dangerous for our Country, dangerous even for our colleagues of the majority, because many of them are unaware of the extent to which we are committing our Country to a policy from which it will be difficult to withdraw.

This is why we invite the Chamber not to ratify the Treaty. Not only do we invite the Chamber not to ratify it, but we add that we shall present the facts of the matter to the country, to the people, in order to show that the Government and the majority have chosen to conduct our Country along a ruinous path. In the interests of Italy, honourable colleagues, I beg you to reject this Treaty, not to ratify it *(Applause from the Extreme Left)*.

Presidency of President *Gronchi*.

THE DISCUSSION CONTINUES ON THE DRAFT BILL: RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF

SIGNATURE, THE ADDITIONAL PROTOCOL AND OF THE EXCHANGE OF NOTES SIGNED IN ROME BETWEEN ITALY AND THE UNITED STATES OF AMERICA ON 2 FEBRUARY 1948 (246).

Chairman: The honourable Rapporteur for the majority has the floor.

Campilli, Rapporteur for the majority: Our colleague Pesenti yesterday and our colleague Berti today have set out and stressed the arguments previously presented before the Foreign Affairs Committee and the Treaties Committee to oppose the draft bill submitted to the attention of the Chamber. The Rt. Hon. Berti introduced his points with several general considerations concerning relations between Italy and the United States, particularly with reference to the ERP Plan. I shall not follow my colleague in this direction in order to avoid too lengthy a discussion. I shall merely reply to two considerations made by the Rt. Hon. Berti, with whose equanimity I am familiar. In claiming that the ERP agreement represents a link between the Italian economy and the United States economy, and entails subordinating the European economy to that of the United States, he mentioned the fact that the ECA administration rejected a French application for an agreement with Poland to exchange machinery for coal. He took this fact as an example of the control and constraints exerted by the United States on the European countries. I must point out to my colleague Berti that if his argument is based on these premises, the constraint that he fears does not exist in reality since Italy managed to reach an agreement with Poland to exchange machinery for coal without any interference occurring and without any exception being taken by the ECA organizations. And this agreement was freely negotiated by us for the sole purpose of resuming trade with Poland even though it was not in our immediate interest to do so. There were two reasons for not doing so: first, because we received coal for machinery, while we could have received coal from the United States without giving anything in return, and second, because Polish coal is more expensive than American coal and represents a treasury outlay of more than one billion.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: I did not say this; the agreement exists, but has not been implemented.

Campilli, Rapporteur for the majority: Another preliminary point raised by the Rt. Hon. Berti: trade between east and west Europe is obstructed by the ERP agreement. My reply to our colleague Berti is that Italy has always maintained, and will continue to do so, that trade with east Europe is complementary to its economy; an effort has always been made to expand it and the ERP programme provides for the long-term increase of trade between Italy and the whole of east Europe, including Russia. Furthermore, the ERP programme presented in Paris by the member countries envisages increasing east-west European trade to more than 2 billion dollars for exports and 2 billion for imports, that is, above the 1938 figures.

If trade with east European countries is as low as it is it is because these countries do not have the funds to pay. The process of industrialization undertaken by some of them in particular has led them to demand large quantities of capital goods without their typical raw materials and consumer goods outputs being large enough to offset the increased import demand. This is true to such an extent that at the UN European Economic Commission the east European countries have made requests to import capital goods, that is, machinery, from the west by opening lines of credit. This means that these countries would like to take indirect advantage of the ERP plan by asking the western countries for concessions that the latter could grant only with the help of American aid.

I do not think there is any point in dwelling further on this topic. Let us therefore go on and examine the Treaty of friendship with the United States. Our colleagues of the minority have stressed the political value that must be assigned to this Treaty and the Rt. Hon. Berti has, on this point, referred also to the section of my report which states that there is an evident interdependence between economic and social factors and political factors in the Protocol under examination.

I confirm the remark, also after the criticism made by the opposition colleagues and refer the opposition to Chapter IX of the United Nations Charter, which all countries, eastern and western, have accepted and countersigned, in the part which explicitly acknowledges that the development of economic and social relations is the most effective means of bringing peoples closer together and the best political means for fostering international peace. It is in this light that we have considered the agreement submitted today for your approval. Even the Rt. Hon. Berti has declared that he considers economic and trade treaties as the best means for achieving peace between peoples. However, in examining the Treaty submitted to you for approval the Rt. Hon. Berti has raised so many "ifs" and "buts" that he has actually voided his premise.

We, instead, are more consistent and can assure our colleague Berti, and all our other colleagues of the minority, that when the Italy-Soviet Treaty comes before Parliament, just as we did before the Foreign Affairs committee, we shall make no subtle distinctions in examining and approving it, precisely because we truly consider economic agreements as the best way of cementing the peace that is in our hearts and minds *(Applause from the Centre and Right)*.

Our colleague Pesenti has said that this Treaty submitted to Parliament for examination is not a true trade treaty. This was actually clearly stated by us in the majority report. This could be neither a trade treaty nor an agreement on emigration: it is simply a treaty of trade, of the establishment of friendship, which defines the premises and lays down the general principles to be respected by the agreements that will follow, we hope soon, in order to regulate trade relations and emigration.

This Treaty cannot therefore be judged by the same yardstick as normal trade agreements: it is a general protocol, not a particular one; it is not an end in itself, but merely the basis for other agreements which will develop the relations between Italy and the United States on a positive basis.

It has been stressed that this Treaty is just another link in the chain binding Italy to the United States: it has even been added that this Treaty is complementary to the North Atlantic Treaty and to the ERP agreement.

I wish to point out to my colleagues that the need to revise the old 1871 Treaty was felt as early as 1946 and the decision to revise it was taken when we still had the tripartite Government in Italy: the delegation led by the Minister Lombardo, which left in mid-1947, completed its work before the end of that year; the agreement was stipulated on 2 February 1948 in Rome. The ERP agreements date back to 3 April 1948: it is therefore absurd to consider this agreement as complementary in that it preceded both the ERP agreement and, to an even greater extent, the North Atlantic Treaty.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur of the minority: The ERP accords were dealt with much earlier . . .

Campilli, Rapporteur of the majority: The drafting of this Treaty, even before the Lombardo delegation, was begun by our Embassy in Washington and by the Ministry of Foreign Affairs.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur of the minority: The tripartite Government would not have approved such a Treaty!

Campilli, Rapporteur of the majority: You say this today; but just as you accepted and managed UNRRA aid so you would have accepted this accord.

The opposition criticism has dwelt in particular on the alleged reciprocity and parity of rights. It has been said that this is a mere figment, a pretence. The different socio-economic structure and, even more, the absence of riders and guarantees, make the statements of parity contained in the Treaty completely null and void.

Our colleague Montini has already given his reply, if the different socio-economic structure should stand in the way of treaty negotiation, this would only become possible between power blocs of comparable strength and capacity.

All treaties are designed to achieve equality and reciprocity of rights. The objective of each negotiator is to place the weaker State on an equal footing with the stronger country. No treaty, however, has the power to offset the inequality of structure that exists between one country and another. Just as going from the international field to the national field the principle of the equality before the law of citizens cannot make up for differences of capacity and opportunity between individuals. This is true under all systems of government.

However, the critics object, in such cases provisos are established and guarantees introduced. This is true. But can it truly be maintained that no provisos or guarantees are envisaged in this Treaty?

Is not the most-favoured-nation clause, which automatically extends to Italy all the advantages and favourable conditions already granted or to be granted by the United States to other powers, the best of guarantees?

Moreover, our colleagues of the opposition, who are always such thorough and watchful perusers of documents, this time failed to focus their attention on the premise to the additional protocol. The additional protocol in fact states that

> "in consideration of the serious economic difficulties facing Italy and those that are foreseeable in view of the previous damage caused by military operations on Italian territory, and the war spoils taken by the German forces after Italy declared war on Germany, of Italy's present impossibility to satisfy the minimal requirements of its people without aid, or the minimal needs of Italian economic recovery, as well as of Italy's lack of foreign currency reserves"

a number of provisos and guarantees must be envisaged, as indeed has been done, for the precise purpose of protecting the Italian economy and finances against those of the United States.

The opposition then dwelt on other aspects and it is precisely on the strength of the latter that its criticism can be seen to be unfounded.

It was even attempted to invalidate the clause governing the exercise of professions and the recognition of degrees and diplomas issued by our universities and educational bodies. The wording in the report of the minority is as follows:

> "Suffice it, for example, to point out that, by means of an internationally inadmissible procedure, the State of Connecticut recognizes as valid only the degrees obtained at the Universities of Naples, Rome and Bologna."

I should like to point out to my colleague Berti that these matters are handled in the same way in Italy. The degrees granted by a foreign country are not entitled to automatic recognition in this country but must be submitted to the final and definitive judgment of the senate and faculties, which have the power to accept or reject them, just as they may ask the applicants to take supplementary examinations. *(Interruption by the Deputy, Giuseppe Berti, son of the late Angelo Berti.)*

We cannot therefore expect others to grant what we ourselves are unwilling to concede.

Then there is the other question on which there has been further heated debate today — that of emigration.

It has been said that if the acknowledged equality is only a pretence, we should at least try of offset this by means of the effective facilitation of emigration. I can assure my colleague Berti that this issue, which is of vital importance to our Country, has never been neglected during negotiations. But no one is more aware than the Rt. Hon. Berti, who has lived in America for a long time, and who has lived in America in contact with the trade unions, of the delicateness and seriousness of the migration issue. Uncontrolled, mass emigration causes great anxiety among the body of workers. It must not be overlooked that, in the past two years, the IRO has made huge labour force transfers to the United States. The trade unions are concerned about exceeding the saturation limits and fear a return of the 1929-1930 crisis. At the political and governmental level, the United States has recently displayed greater sensitivity to our needs, although Italian migration is bound up with a complex issue that calls for careful examination. Furthermore, I am astonished that the criticism should come from the communist benches. Fears and reservations concerning our emigration do not come only from the United States. This is proved by a recent fact. As our colleagues are aware, the Franco-Italian Customs Union is about to be signed. However, our colleagues also know that the provision contained in this customs union, particularly in the case of the transfer of labour, has run into serious opposition from the French communists. Last week the newspapers published the following news item:

> "The French metalworkers, miners and farmers unions belonging to the General Confederation of Labour, have today issued a declaration against the entry to France of Italian workers envisaged in the agreement signed in January by Count Sforza and Robert Schuman. According to the unions, the agreement provides for the migration to France in 1949 of 87,000 Italian workers. The declaration states that there are 100,000 unemployed in France and while even one of them remains jobless there will be no question of recruiting foreign labour of whatever nationality."

This shows that the criticism made by the opposition is at least exaggerated.

The Rt. Hon. Berti meant — and I acknowledge his complete sincerity on this point — that his objections and those of his colleagues are not preconceived. But it is their political position which necessarily and logically leads to their opposition to the Treaty. The Rt. Hon. Pesenti stated so much quite clearly yesterday when he declared that his group will vote not only against the content of the Treaty but also in order to express the opposition's lack of confidence in the Government and in the latter's capacity to look after Italy's interests. There is, in fact, a twofold preconception in their approach which actually makes any objective examination of the Treaty provisions superfluous, namely, their opposition to the Government and that against any agreement with the United States.

The majority, on the other hand, requests the Assembly to approve the draft bill, certain as we are that it is in the country's interests *(Applause from the Centre and the Right)*.

Brusasca (Under-Secretary of State for Foreign Affairs): May I have the floor?

Speaker: Yes, you may.

Brusasca (Under-Secretary of State for Foreign Affairs): I merely wish to emphasize the time factor, as has already been mentioned by the Rt. Hon. Campilli. This Treaty was discussed, stipulated and signed before all the other international agreements, to which the present one is intended to be complementary, were negotiated. I further add that, during the debate, there was confusion between this Treaty, which is general and regulatory in nature, and normal trade agreements. The mistake lies in the fact that the agreements to which both the Rt. Hon. Pesenti yesterday and the Rt. Hon. Berti today were referring are merely a special development, limited in time, of the general rules normally provided for and established by general treaties of friendship, trade and navigation.

However, there is one point, honourable colleagues, which shows what was the main concern of the Government and to which I wish to draw your attention. Much mention has been made of reciprocity. It has been said that we cannot achieve reciprocity vis-à-vis a nation that is economically much more powerful than we are, as is true of the United States. However, there exists another kind of reciprocity which should provide much food for thought, for you opposition deputies in particular: this is human reciprocity. In Italy there are a few thousand United States citizens, almost all of whom living in excellent economic conditions who, precisely because of these conditions, can easily obtain the protection and assistance they need. Today there are more than 600,000 Italians in the United States who want and have been able to keep their Italian nationality. The Treaty of establishment — which is the essential and most important part of the accord we are discussing — has the express aim of defending these 600,000 Italians. Although among this number there will certainly be some who have succeeded in attaining very good economic conditions, the vast majority are salaried workers, retailers and professionals; we have tried to ensure that these fellow citizens of ours are treated in full equality with United States citizens, defending them, as it is our duty and right to do, and ensuring that their conditions are such that we may all be satisfied.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur of the minority: What advantages do they get from the Treaty?

Brusasca (Under-Secretary of State for Foreign Affairs): It is true that, like all other States, we could not expect to limit the internal power of the United States by means of an international agreement. Therefore, our fellow citizens will be subject to the internal limitations imposed on them by the sovereignty of the United States; even the Rt. Hon. Berti, who has been to the United States and has seen also the disadvantages of life in the United States, must admit that Italian citizens living in the country enjoy a number of rights and conditions that I fervently hope will be enjoyed by Italian citizens in all the other countries of the world *(Applause from the Right and Centre).*

Speaker: We shall now proceed to examine the articles.
Let Article I be read.

Parri (Secretary), reads:

> "The President of the Republic is hereby empowered to ratify, and the Government to proceed to fully implement, the following Agreements signed in Rome, between Italy and the United States of America, on 2 February 1948:

(*a*) Treaty of friendship, trade and navigation;
(*b*) Protocol of signature;
(*c*) Additional protocol;
(*d*) Exchange of Notes."

Speaker: No amendments having been presented and no one having asked for the floor, I put it to the vote:

(*It is approved.*)

Let us go on to Article II. Let it be read.

Parri (Secretary), reads:

> "The present law shall come into force on the day of its publication in the *Official Gazette*."

Speaker: I put it to the vote.

(*It is approved.*)

This draft bill will be voted on later by secret ballot.

Document 7

SENATE OF THE REPUBLIC, BILLS AND REPORTS 1948-1949, NO. 344-A,
REPORT OF THE MAJORITY, PAGES 1-10, SENT TO THE OFFICE OF THE PRESIDENT,
28 MAY 1949

[Italian text not reproduced]

SENATE OF THE REPUBLIC, Report of the 3rd Standing Committee (Foreign Affairs and Colonies), on the Draft Bill approved by the Chamber of Deputies during the Session of 29 March 1949 (see Printed form No. 246).

Communicated to the Speaker's office on 28 May 1949

RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND OF THE EXCHANCE OF NOTES SIGNED BETWEEN ITALY AND THE UNITED STATES OF AMERICA, SIGNED IN ROME ON 2ND FEBRUARY 1948.

REPORT OF THE MAJORITY

Honourable Senators. The Treaty of Friendship, Trade and Navigation, which is hereby submitted and proposed for your approval deserves special consideration. After the signing of the peace treaty this is the first important treaty of a general nature, with a wide-ranging, comprehensive structure, to be stipulated with an important country. As such, and in view of the criteria on which it is based, it deserves the prominence of a document which lays down the guidelines to be followed in establishing this country's relation of a civil and economic nature with the other countries.

And since the special political value that the Treaty might have had at the time of its signature — 2 February 1948 — in view of the great importance that the definition of our relations with the United States has, and must have, for our country, can now be said to have been superseded by events and subsequent instruments, such as the bilateral agreement for ERP implementation and the act of joining the OEEC, it is therefore from the standpoint outlined above, that is, for its political technique value, that it should be examined.

GENERAL CHARACTER AND CRITERIA

Although it should be superfluous, several objections raised against the treaty make it necessary to outline its nature of a general treaty, which cannot have as its aim the stipulation of particular and contingent accords of a commercial, migration or cultural nature, etc., of which it merely lays down the required premises. It therefore provides a definitive, organic and lasting frame for the relations between the citizens of the two countries and the juridical status that each of them accords to the citizens of the other country resident in their own country. It is this Rapporteur's opinion that detailed implementation accords will have to be negotiated with regard to the civil matters it touches on.

Mention must also be made at this preliminary stage of the *sui generis* nature of this Treaty which, necessarily conceived for application in normal times and finding our economy in an abnormal, almost ruinous, state, has had to provide for exceptions to the commercial and currency agreements of a general nature which are, or may be, imposed by this state of necessity. This right of suspension with regard to several articles of the Treaty is provided for and defined in the "Additional Protocol", the validity of which or any possible modifications to which, are obviously linked to the further developments in this exceptional situation.

The underlying principles are simple and straightforward. Full respect of the respective sovereignties and full equality of the contracting parties, and thus reciprocity of treatment; systematic application of the principle of the most-favoured nation and thus mutual granting of the most-favoured treatment extended to foreign citizens and interests; spirit of friendship in the application of the Treaty, benevolence in cases not covered by precise regulation, and in any case fair play. Mention must be made of the great care taken to avoid all unfavourable discrimination in reciprocal treatment. Obviously a modern treaty could not be based on general principles which clashed with those mentioned above.

The Treaty under discussion replaces the one stipulated by Italy with the United States in 1871. The latter, now in disuse, was denounced in 1937, when the previous régime decided to replace it with a pact based on its nationalistic and autarchic premisses. In our historical phase of protected national economies, now moving however towards a healthy and necessary expansion, and thus towards a greater freedom of trade, while a return to the free-trade gold standard of 1871 is unfortunately impossible, the most-favoured nation clause with its capacity for reducing tariffs and barriers is without doubt the best instrument for achieving this purpose. It is common knowledge that the on-going Annecy negotiations tend towards an automatic generalization among all the numerous participating States of the most favourable tariff: if, as is fervently to be hoped, the Annecy negotiations overcome the thousand and one difficulties arising from clashing and interlocking interests and succeed in reaching a conclusion, a part of the provisions of the present Treaty will be superseded and transferred into a more general framework. A reservation in this sense is expressed in Article XXIV, paragraph 3, which also makes provision, obviously, in favour of Italy, for possible exceptions to the most-favoured nation rule in the case of a Customs Union. However, in view of the present long-term prospects, uncertain outcomes and in any case gradual application, the Treaty in the meantime represents a cautious guarantee of the healthiest and most favourable normal régime of Italo-United States trade relations.

ESTABLISHMENT CLAUSES

In the usual way, the Treaty deals with the following matters: *general treatment of citizens of the other party* (Arts. I-XIII), *trade and financial operations* (Arts. XIV-XVIII), *navigation* (Arts. XIX-XXII), *transit* (Art. XXIII). Articles XXIV-XXVII contain several general provisions and specify a number of exclusions, exemptions and reservations. A Supplementary Protocol, which interprets several provisions, the Additional Protocol mentioned above, and two notes exchanged between the negotiators envisaging and promising an integrative cultural agreement, all form an integral part of the Treaty.

The Treaty will be of ten years duration, although if not denounced within one year before its expiry, it shall automatically be extended for a further indefinite period, although always with the possibility of withdrawal with one year's prior notice (Art. XXVII). Any disputes shall be referred to the International Court of Justice (Art. XXVI). There are special riders by the United States concerning non-extendable preferential treatment for Cuba, the Philippines, the Panama Canal Zone, and by Italy concerning the free territory of Trieste, the Vatican City and San Marino.

The "establishment clauses" are not innovative with respect to the customary provisions of international treaties, although they do respect the criterion of the most liberal interpretation and extension on the general basis of equality of treatment and always with the reservation that national laws and regulations must be respected. The federal constitution of the United States gives this reservation a special significance since in some cases provision is made for the extension to Italy of the most-favoured treatment granted to foreigners by the individual federal states: this may lead to limitations and inequalities. However, it should be noted that this condition is true for any foreign country entering an agreement with the United States (as with Switzerland), the principle of the most-favoured treatment continuing to work in our favour.

After guaranteeing the exercise of the natural rights of man (Art. XI), regulating military service by means of logical provisions (Art. XIII), it goes on to affirm quite emphatically the freedom, except in the case of the secrecy of military information, of publication and information (Art. XI). This Rapporteur sees no reason for objecting to this clause, and indeed considers it useful and fully to be approved, even if, for the sake of hypothesis, it were to act in favour of the other party only.

The first few articles, which are also the most important, guarantee for citizens of the other party, and for the juridical persons, commercial companies, organizations and associations established by them, the exercise of commercial and non-commercial activities in the broadest sense. Full rights are thus granted to carry on any activity: to acquire, own and manage movable and real property; to organize, direct, and control companies, to hold office; to make and receive legacies; to protect patents and trademarks, etc., with complete freedom to take legal action, and to enjoy protection from undue interference, etc. Taxation matters (Art. IX) are also regulated by applying the principle of reciprocity based on the most-favoured treatment, making sure that any discriminatory procedures are excluded and that the parties have the right to enter into special agreements with third parties under certain circumstances.

Article XII provides for extension to citizens of both countries of the benefits of compulsory social insurance. Even though this obligation is normal practice in the United States and provided for by its internal legislation, its formal embodiment in an international contract is an important fact.

OBSERVATIONS, OBJECTIONS AND SPECIAL CONSIDERATIONS

Whenever differences in American legislation could lead to limitations (Art. VII) of the exercise of real property rights or other real rights or of the free possession and disposal of goods obtained by succession, Italy grants a treatment equal to that of the state of origin of the American citizen. It should be noted that such differences are found in only a few states and it is to be hoped that, unless there is a further move towards uniformity, the coming into force of this Treaty will help bring about revisions favourable to Italy.

The same hope is to be expressed concerning the exercise of the liberal professions, which are in fact all permitted under Article I, except for the legal profession and those involving the appointment of public officials; however, difficulties or inequalities are likely to arise as a result of the regulations governing recognized qualifications, which vary from state to state. The next important task will be to promote the adoption of common and liberal standards, in view of the interest we have in this type of emigration. But precisely because of this interest, the general terms of the Treaty, and the legal basis it provides for these activities, in themselves represent an undeniable advantage.

The condition cited above, by means of which the Treaty provisions are included within the existing framework of respect for local legislation has given rise to complaints in the other house of parliament to the effect that the complexity of American legislation concerning foreigners and the severity of the regulations governing entry and expulsion will necessarily cause the Treaty to be ineffective. However, it would not be reasonable to expect a general establishing agreement to change the laws of the contracting country, nor can it be denied that the formulation of a statute itself provides a legal basis, a highly advantageous starting point for the development of relations between the two countries, particularly by facilitating Italian migration towards the United States. Moreover, the conditions are those of equality, since it is at the request of Italy that the above-mentioned Article I, paragraph 4, makes provision for "reasonable surveillance" of foreigners and of "exclusion or expulsion" for specific reasons. Let us hope that the reasons for surveillance, exclusion and expulsion will cease to apply both in Italy and abroad. The two parties agree not to accord rights and privileges to political activities (Art. XXIV, para. 4).

Two points in the agreement deserve special mention. The first refers to the precise provisions concerning compensation in the case of expropriation and its unrestricted transferability (Art. V and Prot.); the guarantees covering private interests in the case of nationalization (Art. V), and, in the same spirit, a fair play rule to be observed by monopolies or privileged organizations (Art. XVIII) vis-à-vis citizens and interests of the other party. These appear to have been suggested less by Italian interest than by American concern, and are perhaps dictated by the unhappy experiences encountered by US capital outside Italy. In any case, there is nothing here that is likely to lead to conditions of privilege, or that is not legal or fair, or that is not in the interest of the Italian economy itself. This economy is in urgent need of foreign capital investment. Although these provisions will certainly not in themselves be enough to encourage an influx, it is nevertheless desirable to take these precautions against the possible onset of any kind of persecutory or discriminatory conditions.

The second point is related to the freedom "to carry out exploration and to exploit mineral resources" — again under the general conditions cited above and to which the provisions of Article IV are specifically devoted. These are reciprocal terms although the peculiarity of the mention is indicative of American rather than Italian interest. But also on this point there is no apparent reason to challenge its request not to be excluded, on equal conditions, from the Italian market also with regard to oil exploration. In this Rapporteur's opinion, American or foreign initiatives would be useful also to Italy. Everyone is eligible for the granting of concessions and it is the task of our economic policy to ensure that no one, whether Italian or foreigner, obtains a monopoly.

TRADE AND NAVIGATION

Articles XIV-XVI aim to set up general conditions of permanent validity, correctness, availability and publicity for the importation and exportation of goods. As mentioned earlier, the regulating principle is that of automatic equal application of the most-favoured treatment. The possibility of introducing measures unfavourable to third parties is specifically excluded. However, as mentioned above, the additional Protocol grants Italy, in consideration of the peculiar difficulties it faces, a temporary freedom of manoeuvre with regard both to trade quotas and to international payments regulated by Article XVII.

The same norms of freedom, facility and availability are mutually granted by the two parties to navigation and transit trade in Articles XIX-XXII. It is significant that the obligation to grant national treatment or most-favoured-nation treatment to fishing, coastal sea traffic and inland navigation has been excluded.

Apart from the above limited protective measures and of several justified bans and restrictions contained in Article XXIV, the Treaty explicitly renounces any measures standing in the way of competition, limiting the access to markets, or favouring the setting up of monopolistic situations. Full agreement can only be expressed with this, and the use of indirect forms of protection, such as those implemented by means of artificially severe health and hygiene controls on imports are to be rejected. This mention is not without reason, as Italy has occasionally had cause for complaint against this American practice in the case of food imports.

Italy is not, unfortunately, the right country to give lessons in free-trade economic policy; however, since both in the past and in the present, although to a lesser extent, one of the major obstacles to the expansion of international trade has been high American protective tariffs, it is worth expressing the hope that the tendency to reduce customs barriers will continue to grow in the United States.

ADVANTAGES FOR ITALY

The Treaty explicitly excludes (Art. XXIV, para. 7) any possibility of modifying the notoriously restrictive immigration laws in favour of Italy, as a result of which objections and criticism have been raised against it. However, this opposition is artificial because although Italy clearly has a great interest in increasing the unjustly restricted quota assigned to it, and while it is legitimate to ask the Government to do its best to obtain changes, improvements and amendments, such action could not and cannot be carried on through a simple general establishing treaty. The utility of this Treaty and the reason for approving it lies in the recognition it gives to our citizens who have migrated there of the best allowable conditions of freedom to carry on their activities. Similar conditions have been granted to American citizens in Italy. However, it is difficult to argue, in view of the huge number of our migrants and the variety of their interests that the Treaty also in this case is more favourable to the United States than to us.

The disproportion between the strength of the two parties is taken as proof that the Treaty will be ineffective in practice for the weaker party. This argument is unfounded. Legally speaking, based as it is on the strict principle of reciprocity, the Treaty does not set up conditions of privilege, even covertly. A single small possible condition of favour is accorded to the United States by paragraph 5 of the Additional Protocol should Italy be forced to block the payment of expropriation compensation: this is a very small price to pay for the more extensive advantages granted to Italy.

There is no doubt that the Treaty provisions reflect the different interests of the two parties. The United States have above all attempted to protect themselves against xenophobic tendencies in general and in particular against the possible onset of discrimination against their interests and possible exclusions or limitations of activity in the Italian market. Italy has attempted to obtain the broadest possible conditions of work and the protection of special current needs of its trade balance and its balance of payments. How can it be said *a priori* that the Treaty is an instrument in the hands of the United States and that it is of no use to Italy? The Treaty will not open the door to the capitalistic interests of American citizens, but an incorrect or weak or corrupt economic policy could open it more than necessary or without the necessary supervision.

And it could be said that this instrument is more useful to the larger of the two parties if the smaller did not have huge interests in the former. In actual fact, Italian interests in the United States have a far greater importance for our country than the relative importance to America of its interests in Italy. Therefore our interest in the Treaty is greater and, in general, also its benefits to us, in that it helps provide a better environment for the development of all our activities, not only economic activities, in that country. The same preferential trade clause can presumably be of as great a benefit to Italy as it is to the United States.

The correctness of the principles underlying the Treaty, its logical structure and completeness, the desirable dovetailing of the interests of the two countries, the special importance of defining our relations with the United States, the nature of this instrument which, by enhancing the prospects of development of reciprocal relations, nevertheless places them in the framework of a liberal conception of the world economy, help to make it worthy of full approval.

Parri, Rapporteur of the majority.

REPORT OF THE MINORITY

Honourable Senators. The reasons which induced the minority of the Committee to table its own report can be summed up in the following points:

(1) The "Treaty of Friendship, Trade and Navigation" between Italy and the United States of America signed in Rome on 2 February 1948 and presented for discussion, with praiseworthy promptness, only 15 months after its signature, is not one of those treaties that, on the basis of reciprocal benefits and the respect of the political and economic independence of the two contracting parties, can be accepted with satisfaction or receive the favourable vote of colleagues from all sectors of the Senate. No. This time we are dealing with a treaty of a new type that has no precedent in the treaties so far submitted to us for approval. It is a treaty that, beneath its appearance of equality and reciprocity, actually sanctions a situation in which Italy is manifestly inferior and practically entails us giving up any attempt at defence against the political and economic penetration of North American imperialism.

The principle of "national treatment" (mentioned in the preamble and which then recurs in practically all the articles) has been given too wide an acceptance in the present Treaty and can only work to the exclusive advantage of the other High Contracting Party. It is true that the principle appears to have been applied on a footing of perfect reciprocity so that, while it is established that American citizens and American companies must receive a *no less favourable treatment* in Italy (for a wide range of issues) than that granted to Italian citizens and Italian companies, provision is also made for both to enjoy in the United States a treatment no less favourable than that extended to American citizens and companies. However, it is also true that the disproportion in the economic power of the two contracting parties is so great that the above-mentioned equality and reciprocity become quite illusory. Suffice it to consider Article I of the Treaty or Article IV in order to perceive immediately *who* actually benefits from the principle of "national treatment", that is, *who* would and will be capable of carrying out the activities and investments mentioned in the articles cited, outside the borders of his own country. In drafting these clauses of the Treaty no account has evidently been taken of the *special* situation regarding Italy and its needs to be safeguarded. No thought has been given (deliberately or not) to the fact that we are very poor and the Americans are very rich. No steps have been taken to avoid American capitalism penetrating Italy without restraint and without controls, doing in our country what we should never be able to do in the United States.

(2) The solely apparent value of the aforesaid principles of equality and reciprocity appears clearly in all its harshness in one of the final provisions of the Treaty (Art. XXIV, para. 7). Here it is excluded that the Treaty can in any case

> "have any effect on the laws and regulations in force in each High Contracting Party concerning immigration or the right of each High Contracting Party to issue and enforce laws and regulations concerning immigration".

This means in practice that, in exchange for the huge range of action the United States has acquired for itself by means of the Treaty, we are denied even the small benefit of increased Italian migration to the United States, even a small relaxation of the discriminatory "quota" system which offends and damages us more than any other people. Article XXIV, paragraph 7, of the Treaty thus completely voids Article I which gives solemn assurance that the "citizens of each High Contracting Party will have the right to enter the territory of the other High Contracting Party and to reside and travel freely in the said territories". The immigration laws do not admit of any modifications and the only citizens who will be able to travel, reside, etc., will be the American citizens who wish to come to Italy. How's that for "equality and reciprocity"?

(3) Also to be criticized in our opinion is the widespread use of the *most-favoured-nation clause*, as a result of which (for the duration of the agreement), Italy will never be entitled to grant any advantageous or favourable treatment to the citizens or the economic relations with another country without this treatment having to be immediately and equally extended also to the United States. Clearly, it is intended to use this system to bind Italy even more closely to the Western bloc and to deprive her of all possibility of movement, of any different orientation in her international economic policy. This is effectively proved also by the exceptions envisaged in Article XXIV, paragraph 3, to the most-favoured-nation treatment: as is quite apparent, these exceptions will prevent our country from boosting its trade with the Soviet Union and Eastern Europe, that is, with that part of the world which is alone capable of absorbing our manufactured goods. This compulsory orientation, without any chance of change, for the duration of ten years, is condemned by us as damaging to the economic future of our country.

(4) Article V, paragraph 2, represents a reservation that is entirely in the interest of America, in the case of possible nationalization measures in Italy. Although the principle of the "prompt payment of a just and effective compensation" laid down in this article can be considered to correspond to the conceptions of the science of international law and to the established practice between States until the First World War, after that period, and even more so after the Second World War, the very principle has been shaken to the foundations and today even nationalistic doctrine is beginning to display some doubt in this connection. Under these circumstances, Article V, paragraph 2, tends to make it compulsory, *by treaty* between Italy and the United States, to accept a heavy obligation to pay compensation which would be questionable if it were really due (to the same extent and according to the same criteria of time and currency), in accordance

with the *general* international law currently in force. Clearly, were this clause not to have been dictated "less by Italian interest than by American concern" (the words between quotes are those of the rapporteur for the majority), the article in question could only have been expressed as follows:

> "The citizens and juridical persons and associations of each of the High Contracting Parties shall, in the case of expropriation of their property within the territory of the other High Contracting Party, be treated in accordance with the generally accepted principles of international law."

(5) The freedom of belief and worship that are guaranteed by Article XI, paragraph 1, to citizens of each High Contracting Party in the territory of the other High Contracting Party are no longer challenged or subject to special conventions in any civilized country. Since explicit mention has deliberately been made in this Treaty, we must ask ourselves why it was not decided to add an equally essential freedom, that of thought. The trial of the 12, the arrest and imprisonment of Howard Fast, the persecution even in foreign territory of the great anti-fascist Gerhart Lisler, dispense us from any need to discuss this matter further.

(6) The acceptance by the two High Contracting Parties of the "principles of the freedom of the press and the free exchange of information" (Art. XI, para. 2), although theoretically unimpeachable, actually benefit, as the rapporteur for the majority himself was forced to admit, only the other party, which is the only one in a position (and has already done so) to flood our country with his observers, informers, investigators, photographers, etc., as well as with his publications and films, none of which certainly contributes to the education and improvement of our people.

(7) Articles XIV, XV and XVI, which exclude all bans or restrictions on the importation, sale, distribution and use of any natural, cultivated or manufactured product by the other High Contracting Party, as well as making no distinction between necessary and luxury items, cannot fail to bring a smile to the lips of those familiar with the history of United States trade policy, which coincides with the history of the most stringent protectionism and the highest customs tariffs. A country that, in this field, has had laws of a severity without parallel, such as the Hawley Smoot customs law or the Webb-Pomerane law, cannot convert from one day to the next to free trade, free competition, and to the fight against monopolies. Also here all these wonderful things are used to create a *de facto* situation to the exclusive benefit of the United States: and when we read, in Article XV, that the laws, regulations and decisions referring to the customs classification of products or that customs duties

> "will be applied uniformly in all the ports of each High Contracting Party, except when otherwise specifically provided for in the legislation of the United States of America with regard to the importation of products in its own territory and island possessions",

we have the key to this peculiar, one-way conception of equality and reciprocity which is to allow the United States to continue to do as they please in and with our country.

(8) Article XII, paragraph 2, which extends to citizens of both States the benefits of the compulsory insurances (old age, unemployment, sickness, invalidity, etc.), adds nothing new to what already exists because this concession was granted some time ago by law to all foreigners in the United States whatever their country of origin.

(9) Article XIII of the Treaty is actually quite grotesque. It is quite obvious in fact that a State cannot, under international law, subject to service and duties of a military nature the citizens of foreign States present in its territory. Article XIII allows the contracting States to do (and clearly also in this case the United States is in the forefront) what is not allowed in normal practice. The only alternative for those concerned is to go and do their military service, in time of war, in the armed forces of the State whose citizenship they hold — that is, in any case to go and fight for the "common cause"! — should this be what they prefer to do. The question that instinctively comes to mind in the face of such a blatant waiving of the general principles of international law is: *cui prodest?*

(10) No less grotesque, and even a little cynical, are Articles V and VI of the Treaty where they guarantee that the citizens of each High Contracting Party imprisoned by the authorities of the other High Contracting Party shall receive *reasonable and humane* treatment, and where they establish that the homes and offices of citizens and associations of each High Contracting Party situated in the territory of the other shall not be subject to *illegal interference or entry*. To make public commitments of this kind means that here or in the United States (or indeed in both the High Contracting Parties) it is legitimate and customary to subject convicts to unreasonable and inhuman treatment and to enter the homes of citizens and molest and torment them! This Treaty is a precious confession, although we do not know to what extent our Ministry of the Interior and our Ministry of Justice agree with it!

(11) The continual references made in the Treaty clauses to the *laws, regulations*, etc., of the High Contracting Parties would require, in order to make an accurate evaluation of the benefits accruing to the Italian side, an extensive and detailed knowledge of the laws, regulations, etc., of the United States of America. Do those who have negotiated this Treaty and those who will have to implement it have this kind of knowledge? We fear not, and this lack of knowledge can only be of concern to us because we are convinced that the state of American legislation, made so complicated and unwieldy by its federal laws, the laws of the individual states and yet other laws, could hold yet further unpleasant surprises in store for us.

To cite just one example, the United States have laws ranging from the *Alien Act* of 1798 to the *General Act* of 1903 and the *Act* of 1907 on expulsion from the territory which can make the clauses establishing equality of juridical treatment between nationals and foreigners practically unenforceable, and can be used to prohibit the landing and settlement of foreign citizens and to prohibit all activities by foreign citizens as un-American activities.

(12) For the above reasons we consider that the clause of the Treaty which authorizes the citizens of each High Contracting Party to carry on their professional activities in the territory of the other High Contracting Party (Art. I, para. 2) must, as far as we are concerned, remain a dead letter in so far as the laws of the individual states contain clauses which restrict the wide-ranging freedoms granted under the Treaty and nothing is said about the possibility of repealing such laws. On the contrary, we believe that they will remain more solidly in force than ever and that our fellow citizens will not be able in future, as they have not been able in the past, to exercise their professions except in certain states and only after taking a certain number of examinations. Furthermore, on this question, even the rapporteur for the majority does not conceal his concern and is forced to admit that "difficulties or inequalities are likely to arise as a result of the regulations governing recognized qualifications, which vary from state to state" and concludes that "The next important task will be to promote the adoption of common and liberal standards".

In conclusion, we believe that in the "Treaty of Friendship, Trade and Navigation" between Italy and the United States of America which has been submitted to the Senate for approval no provision at all has been made to protect the reciprocity of rights which must be ensured at all costs in this kind of treaty. Although serious, this would not be irreparable if Italy had a Government capable of defending its interests as the Government of the United States defends the interests of that country: a Government which had the courage to ban an American film, to arrest a journalist carrying out spying activities, to refuse an entry visa to an American politician, as the United States Government did to our colleague, Senator Palermo. A Government which dared do this could, if necessary, limit or avoid the undue interference in our affairs by foreign citizens and organizations. Unfortunately, we have no such Government, except in our votes, and the men who govern Italy today have shown themselves more willing to serve than to discuss, more willing to accept supinely than to negotiate, more willing to sacrifice than to defend the interests of the nation. It is also because of our profound lack of confidence in the present Government that we consider the Treaty in question to be extremely dangerous and cannot bring ourselves to approve it.

The rapporteur of the majority considers the Treaty to have now been superseded by the bilateral agreement implementing the ERP and by the act of joining the OEEC. Unfortunately he is right as this is, as we have seen, not one of the customary trade and navigation treaties, but a specifically and substantially political treaty, a link in the chain fettering our country to North American imperialism. We express our objections to such a Treaty quite explicitly and call upon those colleagues who have our country's independence at heart to reject it.

Eugenio Reale, Rapporteur for the minority.

Document 8

Senate of the Republic, Parliamentary Proceedings 1948-1949, CCXXI Session, Debates, 7 June 1949, Pages 8137-8139

[Including draft text of law No. 385, as in force on 15 June 1949]

[Italian text not reproduced]

OFFICIAL GAZETTE — THE SENATE — PARLIAMENTARY PROCEEDINGS, CCXXI SESSION, 7 JUNE 1949

DISCUSSION AND ADOPTION OF THE GOVERNMENT BILL FOR THE "RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, THE PROTOCOL OF SIGNATURE, THE ADDITIONAL PROTOCOL AND THE EXCHANGE OF NOTES, DONE IN ROME BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948" (344).

(Approved by the Chamber of Deputies.)

President: The next item on the order paper is the debate on the government Bill, already approved by the Chamber of Deputies, *Ratification and implementation of the Treaty of Friendship, Commerce and Navigation, the Protocol for Signature, the Additional Protocol and the exchange of Notes, done in Rome between Italy and the United States of America on 2 February 1948.*

I call on the Secretary to read it.

Merlin Angelina, Secretary, then read document No. 344.

President: The floor is now open.

Since no one wishes to speak, I declare the debate closed. I call on the rapporteur for the majority, Senator Parri.

Parri, Rapporteur for the Majority: The text of this Treaty and the report I myself wrote do not, I believe, require a lengthy additional explanation from me. It is a straight-forward treaty, but one which is of special relevance not only because of the importance of our relations with the United States, but also because this is the first major treaty that Italy has entered into with a leading country. It is therefore a kind of specimen-treaty, on which others can perhaps be modelled, in the sense that it puts into practice the general principles of equal treatment, reciprocity and the most-favoured-nation clause, which should be the fundamental principles in treaties of this kind which are essentially of an economic and commercial nature.

This Treaty takes on particular relevance in view of the particular period through which Italy is passing, with a parlous economic and financial situation that makes it necessary for her to temporarily waive the normal principles which govern trade and business between countries; this is mainly covered in a Protocol annexed to the Treaty. Contrary to the view expressed by the rapporteur for the minority, (we consider) that this is of greater importance to our Country than to the United States, because the specific interests of individual Italian businessmen are much more complex and relevant to the economy of Italy than the interests that the United States might have in regard to our Country. It is also a general treaty, a framework treaty, which does no more than to set out our civil, economic and commercial relations with the United States. So we cannot expect it to change the system for emigration to the United States which will evidently have to form the subject-matter of special negotiations to be handled by the Italian Minister for Foreign Affairs — continuous, assiduous negotiations, in view of the importance of this problem to Italy. Neither can it have the character of a particular commercial agreement. This means that as far as the Ministry of Foreign Affairs is concerned, it is still necessary to very carefully pursue the question of the right of establishment of members of the liberal professions, and above all the right for them to exercise their professions. The Ministry of Foreign Affairs does not need any recommendations from us: these are problems with which it is well acquainted and has been dealing with for a long time. However, it would be useful for the Senate to adopt recommendations of this kind, urging that the possibility of practising the liberal professions, in particular — because this might be relevant to a certain section of our emigrants — should form the basis of negotiations, in order to try to establish a single system in the legislation of the various States for the recognition of Italian academic qualifications. This would prevent, or alleviate, the difficulties which Italian professionals are currently experiencing, at least in some or quite a few states in the US Confederation. I will merely add that, as far as the state of Italian emigration to the United States is concerned, although the opportunities at present are not very great, I believe that something can be done, especially with regard to opening the doors to craftsmen wishing to settle in the large cities, and to raising Italy's immigration quotas.

All told, as I said in my Report, the Treaty is necessary not only because of its relevance to the Italian economy, but because it forms a starting point, a legal basis from which to improve the treatment of fellow Italians who migrate to the United States. I believe that the Senate will be able to approve the Bill, fully realizing that it is an extremely useful international instrument for the Italian economy and for the development of peaceful relations with the United States.

President: Since the Rapporteur for the minority, Sen. Eugenio, is absent, I give the floor to the Under-Secretary of State for Foreign Affairs, Mr. Brusasca.

Brusasca, Under-Secretary of State for Foreign Affairs: The Government would merely wish to underscore some of the points made by the Rapporteur, Sen. Parri.

This Treaty is a general one, and does not therefore deal with any specific subject-matter, because specific subjects are dealt with in particular treaties which States conclude from time to time. The essential part of this Treaty is the one which contains provisions governing establishment, namely, the provisions we have managed to obtain which give Italian citizens resident in the United States equal treatment with citizens of the United States. This is, in a sense, an achievement of genuine international democracy which enables the nationals of one State living in another State to enjoy the rights accorded to the nationals of that State. We hope that what has now been granted to the Italians in the United States will be extended to Italians living in every foreign country, and indeed to nationals of every State in whatever country they live. This would generate that international understanding and that mutual trust to which modern democracy aspires and demands.

President: We will now debate the individual clauses.

Clause 1

The President of the Republic is authorized to ratify and the Government to fully and wholly implement the following Agreements concluded in Rome between Italy and the United States of America on 2 February 1948:

(a) Treaty of Friendship, Commerce and Navigation;
(b) Protocol of Signature;
(c) Additional Protocol;
(d) Exchange of Notes.

(Adopted.)

Clause 2

This law shall come into force on the day of its publication in the *Gazzetta Ufficiale*.

(Adopted.)

Document 9

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, DOCUMENTS, BILLS AND REPORTS, NO. 537, PAGES 1-4, PRESENTED TO THE OFFICE OF THE PRESIDENT, 8 NOVEMBER 1958

[Italian text not reproduced]

OFFICIAL GAZETTE — PARLIAMENTARY PROCEEDINGS, III LEGISLATURE

BILL FOR THE RATIFICATION AND IMPLEMENTATION OF THE SUPPLEMENTAL AGREEMENT OF THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN ITALY AND THE UNITED STATES OF AMERICA, CONCLUDED IN WASHINGTON ON 26 SEPTEMBER 1951.

Lodged with the Office of the President on 8.11.1958.

Honourable Colleagues. In recent years, although the Italian economic and social situation has held down inflation and ensured a solid currency, there has been a large balance of payments deficit and, what is even more worrying, unemployment is tending to stay very high.

The main obstacle to boosting economic activity sufficiently to increase agricultural and industrial output and reduce unemployment is certainly the shortage of domestic capital: foreign capital is therefore warmly welcomed, and it is now unanimously acknowledged that something should be done to attract foreign capital.

In other words, we should augment the inadequate, though intrinsically high level of domestic savings, not only by the provision of government loans or grants, but by encouraging inflows of private capital investment into Italy.

Hence the need to take all the political, legal and economic measures that will facilitate private investment from abroad: in other words, to create a situation in which foreign investment is secure and given equal treatment. It is because of the need to increase domestic investment in view of our particular post-war economic situation that Italy has embarked on a policy to foster the inflow of private and public capital from abroad.

Inflows of capital from government sources, or public agencies, have been promoted through direct negotiations with governments.

We have endeavoured to encourage the inflow of private capital — a problem which is of more specific relevance to this report — by thoroughly overhauling the old legislation that had long placed restrictions on foreign investment. This far-reaching innovation was enacted in Decree No. 211 of 2 March 1948 which completely liberalized foreign capital investment in Italy, with a few restrictions, mainly relating to currency matters. To encourage the inflow of foreign capital investment, however, it is not enough just to create the appropriate opportunities and conditions at home, to which we referred earlier and which are essentially based on the political/administrative system. It is also necessary to ensure that the conditions we establish (exchange rate, investment security, transferability, etc.) match the ones that the foreign investors want or demand according to the legislation and the customs of their own countries.

And since "foreign investment" today means, above all, investment from the United States, we deemed it advisable to remove any obstacle to the inflow of private American capital by concluding a special agreement with the United States Government which, after painstaking negotiations, was eventually signed in Washington on 26 September 1951.

Beginning early in 1950, the Ministry of Foreign Affairs stepped up contacts with political and financial circles in the United States to foster the inflow of capital into Italy, meeting representatives of official agencies (the State Department, point 4, ECA) and private organizations (the American section of the international Chamber of Commerce).

As a result of these initial contacts, we now have a much clearer idea of what American investors are looking for, and realize the need for a special treaty between the two countries.

The needs of American investors may be summarized as follows:

the creation of a favourable economic, social and political climate in the country in which they invest;

co-operation on the part of the country in which the investment is made both through its investment policy and through the provision of local capital which American capital should complement, not replace;

protection of the rights of the American companies and individuals in the companies in which they invest;

possibility of repatriating invested capital and capital gains;

guarantees against discrimination;

guarantees against political risks;

fair and unequivocal tax treatment;

exchange rate guarantees.

What was therefore required was to guarantee the American investors any of the afore-mentioned conditions not already guaranteed, as far as possible, while at the same time protecting Italian interests, above all by defending the currency and obtaining direct, long-term as opposed to speculative, productive investment.

In February 1950, the Italian Government, through its Embassy in Washington, therefore proposed that negotiations should begin with the American Government to conclude an agreement to complement the Treaty of Friendship, Commerce and Navigation of 2 February 1948, specifically to increase two-way capital investment, but naturally with particular reference to American investment in Italy.

The United States Government accepted the Italian proposal, and on 9 March 1950 it submitted a draft treaty which was examined at a large number of meetings in March and April of that same year by the Italian Government departments directly concerned.

At the conclusion of these meetings, on 13 June 1950, Italy produced a counter-draft comprising a preamble and 11 articles. After receiving CIR approval it was once again submitted for examination to the American Government.

Despite repeated requests on our part, the American response to our counter-draft was delivered to the Embassy in Washington a year later, in May 1951.

The memo containing the American comments on it was then forwarded to the other Ministers concerned, for their counter-proposals, if any; with the agreement of the Italian Treasury, the CIR was empowered to examine the memo.

At the suggestion of the Department of State, a special clause on social insurance was also incorporated into the draft agreement.

The comments on the American counter-proposals drawn up by the Italian Government departments concerned were then discussed in Washington where, during the visit of the Italian Premier to the United States, the Agreement was signed by the Italian Treasury Minister and the American Secretary of State on 26 September 1951.

The Agreement sets out, first of all, to ban any discriminatory measures that either country might adopt against the interests of citizens or legal persons of the other contracting State, designed to restrain their management or real control of the companies for which they have obtained the necessary permission for their purchase or establishment; or designed to restrain the exercise of any other rights or prejudice the interests of these companies or investments in whatever form they may be made.

It also requires the parties to remove any discrimination on terms for obtaining capital or the technical processes and inventions required for economic development.

In order to offer investors the maximum freedom of choice in respect of the companies they are planning to constitute or which they are already operating, or in which they have a financial holding, they are also granted the possibility of employing technical and administrative experts to conduct inspections and investigations and to draft reports, albeit solely in the ambit of the company, and solely on behalf of the investors, regardless of legislation governing the prerequisites for the exercise of a profession.

It also lays down the principle of the most favourable treatment for the transferability of invested capital, and extends this transferability to income accruing to the investment.

According to this principle, it will therefore be possible for an investor to obtain foreign exchange from his own country to transfer both capital and income of whatever kind (including wages and salaries, interest, dividends, commissions etc.), as well as the amounts required to repay loans or for the depreciation of capital assets.

To this end, special provisions have been drawn up to establish the rate of exchange applicable to such transfers. It shall be the exchange rate which the International Monetary Fund shall specifically approve for these transactions, or, in the absence thereof, an exchange rate which is both fair and reasonable.

The supplemental Agreement contains another special facility to foster investment in Italy.

Such investment will be eligible for the special tax relief and special rates of customs duty and freight charges available for the development of Southern Italy (Law No. 1598 of 14.12.1948) and for the development of the Apuana industrial zone, and the industrial zones of Verona, Gorizia, Trieste, Leghorn, Marghera, Bolzano and any others provided under current or future Italian law.

In periods of currency difficulties, it is nevertheless possible to apply exchange restrictions to the principle of the complete transferability of capital and income accruing thereto, in order to prevent an excessive fall in currency reserves, to slightly increase the reserves if they are deemed to be too low, or to guarantee the availability of sufficient foreign exchange to pay for the essential goods and services required for the health and welfare of the people.

Exchange rate charges may also be levied which are specifically authorized or requested by the IMF.

The Contracting Party which applies these exchange rate charges must, however, take other measures for the transfer of capital, income and funds for the repayment of loans, through appropriate consultations with the other State.

These measures will be re-examined by the Contracting Parties at intervals of not more than 12 months.

The supplemental Agreement also recognizes the validity of the clauses in contracts concluded by private citizens of both countries relating to the settlement of disputes through arbitration.

These clauses cannot be deemed invalid for the purposes of performance in the territories of the other Contracting Party on the sole ground that the place indicated for the arbitration procedure lies outside their territories, or because one of the arbitrators is a national of a country other than that of the other Contracting Party. It is agreed that before any arbitration decision can be enforced in the territory of either State, it must first be recognized by a national court.

A special article of the supplemental Agreement lays down the essential provisions of a convention on social insurance which must be concluded between the two countries as soon as possible.

Provision is made for citizens belonging to a social insurance scheme in either country to be able to count the periods spent in the other country towards the minimum period required to qualify for social insurance benefits.

This right applies for disability, retirement and survivorship pensions in which the period of insurance is of greater relevance for the purposes of risk coverage. Furthermore, Article 2 of the Treaty of 2 February 1948 already enshrined the principle of the equal treatment of citizens of the countries in relation to compulsory social insurance benefits and their rights subsequent to industrial accident or disease and civil liability.

Article 7 of the supplemental Agreement provides that as far as disability, retirement and survivorship pensions are concerned, benefit rights shall be determined according to the *pro rata temporis* system, which is the one that is commonly used, without prejudice to any provisions to the contrary contained in the 1935 ILO Treaty, if any, if ever the latter comes into effect between the two countries.

If, as is unanimously acknowledged, the Italian economy is gravely hampered by the chronic shortage of natural resources to meet the needs of its potential population and by the surplus manpower available in terms of the employment opportunities, and above all by the shortage of capital available to meet the country's needs, it would seem fair to conclude that if these gaps could be adequately bridged by using external resources, the economic cycle could be activated and accelerated, generating production, national income, and rapidly and gradually absorbing a substantial percentage of unemployment and improving the balance of payments.

Attracting private investment from abroad is one of the most important of these measures.

The supplemental Agreement signed in Washington on 26 September 1951 is designed above all to foster investment in Italy using private capital from the United States which is the most important, perhaps even the only, country today which has such resources at its disposal.

This government Bill, that was placed before Parliament in the 2nd legislature, expired with that legislature.

GOVERNMENT BILL

Clause 1

The President of the Republic is authorized to ratify the supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, concluded in Washington on 26 September 1951.

Clause 2

The Agreement shall come fully into effect on the date of its entry into force as stipulated in Article IX of the Agreement.

Document 10

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, DEBATES, SESSION OF 7 OCTOBER 1959, PAGES 10829-10831

[Italian text not reproduced]

OFFICIAL GAZETTE — PARLIAMENTARY PROCEEDINGS, III LEGISLATURE — DEBATES ON 7 OCTOBER 1959

DEBATE ON THE GOVERNMENT BILL: RATIFICATION AND ENTRY INTO FORCE OF THE SUPPLEMENTAL AGREEMENT TO THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, CONCLUDED IN WASHINGTON ON 26 SEPTEMBER 1951 (537).

President: The business on the order paper is: "*Debate on the Government Bill: Ratification and entry into force of the Supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, concluded in Washington on 26 September 1951.*"

The floor is open for the general debate.

The first speaker is Mr. Assennato.

Assennato: Mr. President, you will agree with me that this is a strange Bill, a re-exhumed Bill previously tabled on 8 November 1958, for the ratification and entry into effect of an international agreement dated 2 February 1948, which was eventually concluded in Washington on 26 September 1951.

Neither the Government's report nor the report of Mr. Vedovato, who is usually so diligent, provides any explanation for this mysterious delay. An explanation would be in order.

Scelba, Committee Chairman: The measure has only been tabled today for adoption, having lapsed in previous legislature because of the dissolution of Parliament.

Assennato: You'll have to do better than that, Mr. Scelba. Since 1951, Parliament has only been dissolved twice.

I put it to you, Mr. President, that the subject-matter of this convention is now out of date. I believe that there was great reluctance to place it before Parliament, because it is an international agreement to attract foreign capital — more specifically American capital — into Italy. This is the substance of the agreement. Except that after the agreement was drawn up, the Law of 7 February 1956 on Foreign Investment in Italy was enacted, protecting foreign capital investment in Italy, giving investors the freedom to dispose of their investment and the certainty of making a profit on it. So there is already a law of the land which naturally also applies to foreign capital from the United States. This is the reason for the reluctance. You, Mr. Scelba, were Prime Minister then, and you know that the reason for the delay had nothing to do with it being overlooked or neglected.

The law-maker looks for a rationale, and the rationale in this case explains the reason for the delay: the enactment of a measure regulating foreign investment in Italy.

But what was it that drove the Government to dig up this measure again? In the Minister's report, Mr. Scelba, there are certain things which do little for our national dignity and for the unfettered operation of our constitutional institutions. It mentions the needs of the American investors, and maintains that this convention would protect them. We shall be seeing in a moment what these needs are. But first I have to say that in these articles there are no clues as to the way in which these needs are supposed to be guaranteed.

The report says this: "The needs of American investors may be summarized as follows: the creation of a favourable economic, social and political climate in the country in which they invest." What does that mean? Who was the simple-minded or naive person who used the word "creation" here? We could have understood it better if it had said something about a guarantee. And yet, in the most brazen, indeed the most heavy-handed and clumsy manner, the Bill speaks of creating a favourable economic, social and political climate.

Where is this assurance given, anywhere in the text?

Later on it says, "What was therefore required was to guarantee the American investors . . . the afore-mentioned conditions . . .". But none of these conditions are listed anywhere in the text of the agreement!

Mr. President, we intend to get to the bottom of this matter, because it has to do with the very existence of our parliamentary institutions. Because speaking about "creating a favourable economic, social and political climate" necessarily relates to our responsibility as parliamentarians. We construe this to imply the "freezing" of a particular economic, social and political situation that now exists. And it had better not mean anything different from that, because there can only be two alternatives, of which the one I just mentioned is simply the better of the two. The sentence in question can, in fact, be construed to mean a "freezing" of the *status quo*, or — what is even worse — the creation of a new situation.

I will pass over the reference to "guarantees against discrimination" which could also mean equal treatment accorded to other foreign capital. But, Mr. Scelba, we are bewildered to read in your report what it says about "guarantees against political risks". Since this document is signed by Giuseppe Pella for the Italian Government, in his capacity at the time as Minister of the Budget, the only political risk we can imagine that this agreement guarantees against is the political risk that Mr. Pella does not become a minister again! Or perhaps against the risk of his political party ruling the country for ever after? What other kind of political risk could there be? The Italian Constitution provides for different political groupings to take office in government depending on the results of the elections. All this talk about guarantees against the political risk of the party with a relative majority not being able to stay at the political helm of the country would therefore appear to be not only unconstitutional but also nonsense.

Mr. Folchi: Is it true to say that the original document contains something that is not written down here, which might shed light on the best way of construing this sentence? If so, we are not dealing with an international agreement for foreign capital investment, but we are faced with a problem that has to do with the international politics of the activities of the then Minister of the Interior, Mr. Scelba, regarding his assurances about "freezing" a given domestic political situation and a given economic structure as they stood at the moment the agreement was being ratified, in order to offer adequate guarantees to foreign investors.

I beg my colleagues to believe me when I say that there is no malice in my words; I am simply reading what is written in the text of the agreement tabled for ratification by the House.

I could, at most, understand an assurance against the risks of a fire breaking out and destroying the foreign capital deposited in the Bank of Italy; but I cannot for the life of me go along with any assurance against the political risk that the Christian Democratic Party might be thrown out of the government of this country. In this statement, there is something which degrades our country, which damages its dignity, because it commits the country to "freezing" the economic, social and political *status quo* in order to be able to benefit from the aid of foreign capital (and it remains to be seen whether the country as a whole is going to benefit, or whether only certain groups or sections of the country do).

Mr. President, what is even more depressing about it is the fact that this agreement is being bandied around as if it were something to boast about.

Since my suspicions were aroused, I tried to examine the archives — as I was duty-bound to do — to find the original report given by Mr. Vedovato. Usually, Mr. Vedovato is very punctilious and diligent, but this time he wriggled out of it with three words and a grin, and we absolutely refuse to accept this kind of behaviour, and particularly this offensive attitude which offends against our dignity as parliamentarians and humiliates the country.

What is all the mystery behind this assurance? Where in the agreement are all these assurances against political risks and against the unfavourable economic climate to investor countries, and the undertaking to create a new and more favourable one? I really would like to know where these things are written down, in which corner in the document they are tucked away, with what ink they have been drafted. Is there perhaps some secret schedule?

We cannot accept that an official document of the Italian Republic can say something which is against the provisions of the Constitution. You are undertaking a commitment which is blatantly against the Constitution, which is a violation of it — and I would go so far as to call it an act of treachery, because while you swear to be faithful to the Constitution which guarantees this new instrument as the country's economic structures progress and change, you commit yourselves to a foreign power to permanently create a situation which will hinder and halt these structural, economic and social changes in our country.

This is why we will vote against it, Mr. President, and we anxiously await the Government's reply.

President: After the speech by Mr. Assennato, and considering that the rapporteur, Mr. Vedovato, is absent, I think it is advisable to adjourn the debate to another day.

Scelba, Committee chairman: The Committee agrees.

Folchi, Under-Secretary of State for Foreign Affairs: I wish to take the floor.

President: You have the floor.

Folchi, Under-Secretary of State for Foreign Affairs: Mr. President, the Government supports your suggestion. I will wittingly provide any explanations that may be needed at a future session. But I would just like to make one remark to Mr. Assennato: this measure was approved by the Chamber six-and-a-half years ago, and we took it for granted that after six-and-a-half years, such difficult Constitutional issues as these would not have been raised.

President: The debate is adjourned.

Document 11

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, DEBATES, SESSION OF 15 DECEMBER 1959, PAGES 12272-12281

[Italian text not reproduced]

OFFICIAL GAZETTE — PARLIAMENTARY PROCEEDINGS, III LEGISLATURE — DEBATES ON 15 DECEMBER 1959

RESUMPTION OF THE DEBATE ON THE GOVERNMENT BILL: RATIFICATION AND ENTRY INTO FORCE OF THE SUPPLEMENTAL AGREEMENT TO THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, CONCLUDED IN WASHINGTON ON 26 SEPTEMBER 1951 (537).

President: The business on the order paper is: "*Resumption of the debate on the Government Bill: Ratification and entry into force of the Supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, concluded in Washington on 26 September 1951.*"

Mr. Giovanni Grilli has the floor.

Grilli, Giovanni: Mr. President, I must begin by expressing my astonishment that it is only now that we are being asked to debate a treaty that was concluded in 1951. It would be most interesting to know from the Government the reasons for this long delay. I am sorry that Mr. Pella is not here, because he is responsible for this wholly abnormal delay, and I am sorry that it is Mr. Folchi who has to answer the points I am about to raise, because when this Treaty was signed, Mr. Folchi was not even a Member of Parliament. Under Article 9, this agreement should not have been implemented until it had been ratified by both Houses of Parliament. The article itself states that "This agreement will come into effect on the day ratification is exchanged". And yet the agreement has already been brought into effect, and everything relating to the import of United States capital is governed by it already. This is a violation of the Constitution, which requires certain types of treaty to be ratified by Parliament, and it is also an infringement of the commitment undertaken when the agreement was signed. Article 80 of the Constitution states that

> "Both Houses of Parliament shall authorize the ratification of international treaties of a political nature, or which provide for arbitration or judicial settlements, or entail changes in the territory or financial charges, or changes in the law, by enacting a law to this effect."

No-one can doubt that the agreement signed in Washington in 1951 is a political document; one only needs to read the accompanying ministerial report to see that. The report says that as a result of the contacts leading up to the drafting of the agreement, certain demands of American investors had emerged, including the need to create a favourable economic, social and political climate, and hence, to create a situation guaranteeing protection against political risks. The same agreement also provided for changes in Italian legislation regarding the import of foreign capital. Hence there is a twofold reason for necessarily submitting it promptly to Parliament for ratification. However, as I just said, the Government failed to comply with the provisions of the Constitution and failed to honour its commitment to implement the agreement only after it had been ratified by Parliament.

I will not waste my breath on this behaviour of the Government which we know is accustomed to breaking the Constitution, as we have been denouncing for a long time. But once again we are forced to call the House's attention to the seriousness of this Government's behaviour and the repercussions it is having on our institutions. The failure to respect the country's Constitution necessarily creates serious upsets in our national life, unless those of us who demand respect for the Constitution grow in strength and know how to impose compliance with it.

Before I examine the Bill, I should like to draw the attention of the House to the Minister's report accompanying the ratification Bill. It says that the idea of concluding this agreement was to guarantee as far as possible the sort of conditions that would be likely to attract foreign investment to Italy; and one of these conditions was the creation of a favourable economic, social and political climate, and the provision of guarantees against political risks. The document which says these things bears the signature of the present Foreign Minister, Mr. Pella. The same Mr. Pella, who, with Mr. Scelba and other Cabinet colleagues, undertook a commitment with a foreign government to create the political conditions which that government demanded, and to guarantee its investments in Italy against political risks. In other words, what the government to which Mr. Pella belonged undertook to do was not what our own people wanted or might have demanded, nor to respect the provisions of Italian law, but to agree to the demands of American investors. I really do believe that it would be impossible to sink any lower than that! Precisely at a time when all the colonial countries are angrily rising up against foreign domination and when even in the heart of Africa, hundreds of men are laying down their lives for their countries' independence, a minister of the Italian Republic is unhesitatingly able to state his readiness to give way to the requests of capitalists from other countries, ignoring the fact that these demands are against the Constitution and the dignity of our Country.

As far as the substance of the Bill and the convention is concerned, let me say at once that it has already been superseded by Law 43 of 7 February 1956. In general terms, the provisions of this law are more restrictive than the agreement which we are being asked to ratify. One might say that the 1951 agreement, which we are supposed to ratify today, was much more generous to foreign capitalists than the new law. Article 3 (2) of the agreement states that "Income, in the form of salaries, interest, dividends, commissions, industrial royalties, payments for technical services, or any other income, or funds to repay loans and for the depreciation of fixed investments" and the original capital invested here "can be freely transferred", in the currency of the investor's country.

Section 2 of Law 43 of 7 February 1956 places considerable restrictions on the repatriation of capital and profits, however, and in some cases the share of profits and dividends which may be exported is not allowed to exceed 8 per cent of the capital invested. The transfer of capital gains from subsequent disposals may not exceed the amount of foreign currency originally imported, or take place until two years have elapsed from the date of the investment. I must confess that these are not severe restrictions, but there is no right to freely transfer the capital which is sanctioned in the 1951 Italo-American agreement.

Further restrictions are provided in other sections of the 1956 Law. Section 6 states that before money and loan repayments can be transferred abroad, authorization is required from the "Ufficio Cambi", for which an application is required to be made through the Bank of Italy or other institutions with these powers. Here again, there is a clash with the right to "freely export", enshrined in the 1951 agreement between the Italian and American Governments.

Perhaps we should be told whether it is the 1956 law or the 1951 agreement which applies to the transfer of currency to the United States. If we, today, in 1959, ratify the 1951 agreement, will this repeal the 1956 law? The Under-Secretary will probably reply that the 1956 law is still valid. If so, why is it that we are ratifying, today, an agreement which partly contradicts, or at least differs from, a law enacted by Parliament in 1956? I am not a lawyer, but one might suspect that the ratification of the 1951 agreement is tantamount to giving Americans with capital in Italy the possibility of using the provisions of the 1951 agreement, which differs from the 1956 Act of Parliament.

The Under-Secretary must therefore tell us whether this danger really exists, because if it does, by ratifying this agreement Parliament would be breaking a law which it has already enacted, to favour American citizens without having thoroughly discussed the issue.

An objection of quite another nature could be levelled against this agreement that we are being asked to ratify — an agreement which, as I have already pointed out, has been in force since 1951 without being sanctioned by Parliament. Many parts of the agreement clash with the law as it stood at the time it was concluded. Before Law 43 of 7 February 1956 came into effect, foreign capital investment in Italy was governed by Decree 211 of 2 March 1948, whose provisions differ substantially from those contained in the agreement. The 1948 decree — signed by Mr. De Gasperi and Mr. De Nicola, who was the provisional Head of State at the time — provided that applications for the transfer abroad of capital in the currency in which it had been invested could not be made for at least five years after the investment had been made. According to the 1951 Agreement, however, any capital investment, without qualification, can be freely transferred without any application or prior notice, and the investor can therefore obtain the equivalent value in dollars.

Article 3 (2), says that investors can

> "obtain the dollar equivalent of and freely transfer income, in the form of salaries, interest, dividends, commission, royalties, payments for technical services and any other nature, or the funds to repay loans and provide for depreciation of capital assets, and the capital actually invested".

But the 2 March 1948 Decree provided otherwise: it said that the following could be transferred abroad: (1) income, interest and capital gains from real estate or loans, and dividends and interest from investments in securities and debentures purchased and subscribed in Italy, up to one percentage point more than the annual statutory interest; (2) capital gains from disposals, up to the original amount of currency imported, and only if the transfer is requested at least two years after the investment was made.

As you see, the agreement gives rise to a number of doubts, quite apart from other contradictions between our law and the agreement between Mr. Pella and Mr. Acheson.

And so how could Mr. Pella take the liberty to strike an agreement with a foreign power, whose clauses were in contrast to the laws of the Republic? And secondly, how could that Government, and the ones that followed it, bring that agreement into effect? There would be no need for this question if both Houses of Parliament had enacted a law ratifying the agreement after it had been drawn up. But so far, no authorization or ratification has been forthcoming. This means that everything that the Government has done since 1951 to implement the agreements concluded by Mr. Pella is manifestly illegal and therefore can be invalidated by anyone.

Deputy President Targetti then took the Chair.

Grilli, Giovanni: Now we can see where the servility mania of those who have ruled us for the past ten years, and still rule us today, has got us. I have used the expression "servility mania" advisedly, Mr. Folchi, because what Mr. Pella and Mr. Acheson agreed to in 1951 was not at all necessary to protect and develop the Italian economy.

There is no doubt that the Italian economy was, and still is, short of capital, even though today there is 8,000 billion lire sitting in the banks without being able to find any productive investment for it, to meet the country's needs. Yet we are not a capital-rich country, and eight years ago capital from abroad would have been very welcome if it had been invested in such a way as to meet our country's needs. But in the agreements that Parliament is now being asked to approve, no criteria are given for establishing priorities for American investment in Italy; importers of capital are placed under no obligations. Indeed, all the provisions governing the import and transfer of capital are manifestly designed to benefit only the American owners of the capital brought into Italy and, as I already said, they go much further than Italian law allows. In addition to this, a substantial share of the imported capital has not been used to strengthen the Italian economy, but rather to strengthen the hold of the main monopoly corporations in our Country. Another portion has been used to increase our investment in infrastructure, or in ventures which are not directly productive, thereby heightening the distortions in our investments and in the whole of our production policy — that distortion which has been created by the general action of the various governments that have taken turns in power.

It is not improbable that some of the imported capital has been used to boost the economic fortunes of some of the friends of these governments. Unless I am mistaken, Mr. Folchi, among the importers of capitals into Italy is the Hilton Company: the one which is preparing to build a hotel on Monte Mario with the Immobiliare Company, of which quite a few friends of the present and past Governments are members, and probably the American chemicals company, Squibb, the Chairman of whose Italian subsidiary is — lo and behold! — the parliamentarian, Mr. Ivan Matteo Lombardo, who was a member of several previous Governments. Then the Italian Underwood Company, which we assume has imported capital under the protection of this agreement, is chaired by a man who is a friend of the Government, Mr. Malavasi, the former Chairman of ENAL. As you can see, in all these cases, imported capital has been used to help people who are friends of the Government, but not the economy of our Country.

For all these reasons, we believe that the House must not endorse what the Government has done by voting to approve and ratify the agreement which has been submitted to us, after such a long delay. If the House wants the Constitution, its prerogatives and current legislation to be honoured, and if it wants to protect its own dignity, it must necessarily reject the Government's request to ratify the agreement which has been submitted to it for discussion, after more than seven years since it was concluded.

It should also be noted that the retarded ratification of the agreement does not legitimate any of the acts performed in implementation of the agreement, leaving open the possibility of asking them to be revoked at any time.

This, Mr. Folchi, serves to show the thoughtless way — to put it euphemistically — the Government signed the agreement which was equally thoughtlessly accepted by the Cabinets which followed *(Applause from the Left)*.

President: Since no one else has asked for the floor, the general debate is now adjourned.

Mr. Vedovato has the floor.

Vedovato, Rapporteur: Mr. President, honourable colleagues, as the President of the House has told you, when the debate on this Bill began I was abroad on official business.

On the resumption of the debate, Mr. Giovanni Grilli added new material to what his honourable friend, Mr. Assennato, had raised when the debate on this Bill began.

Mr. Grilli has committed one factual error and one legal error. He intends to depict Mr. Pella as the author of the agreement; his criticisms, like Mr. Assennato's, do not refer so much to the actual agreement itself, but rather to the report accompanying it. This is the factual error. The report was drafted by Mr. Fanfani, who was the Foreign Minister at the time. But I do not believe that in a parliamentary debate one can criticize the report and not the actual text of the agreement. We will see why, shortly. As far as the legal error is concerned, I trust that Mr. Grilli will permit me to say that matters did not go quite as he has presented them to the House. There are various ways of ratifying international agreements. There is the simple ratification procedure, when it is acknowledged that the agreement is in full compliance with the Constitution, and there is the implementation procedure — which is the one we are dealing with today. In other words, by approving the Bill before the House today, authorization is given to the Head of State to ratify it, and the international agreement then becomes fully effective domestically.

The effect is practical: when the instrument becomes law after going through the usual procedures, it becomes *ipso facto* effective. Another effect is that until the ratification of the Bill is approved, the international instrument to which it refers has no practical value. So it is not true at all, as Mr. Grilli maintains, that this agreement has already been brought into effect and that the Italian Government has performed acts in implementation of it, in defiance of the Constitution.

And then, Mr. Grilli, you asked whether foreign capital in Italy is to be governed by the February 1956 Law, or by the agreement which we are about to ratify. There is no shadow of doubt: the legal validity of this instrument supersedes the earlier law, wherever they differ. In other words, where this later law contains provisions which clash with the earlier law, it is the later law which takes precedence, not the earlier one.

Having clarified that point, and having established that the Italian Government has not violated the Constitution, I will turn to Mr. Grilli's other objections with regard to the way foreign capital investment in Italy is governed, and the income from this investment is transferred.

The fact that Mr. Grilli is not — if I may put it this way — as adequately informed as befits a person who wishes to express such heavy-handed criticisms as he, can be deduced from the way he quoted the Bill we are to vote on, the 1956 Law, and the 1948 Law, at one and the same time and without distinction.

If there is a rationale behind the law, and if we really do want to know exactly which legal provisions govern investment and the subsequent export of the income accruing to it, we have to see whether and where the 1956 law introduced innovations to the provisions of the 1948 law, and whether and where the Bill before us introduces innovations to the provisions of both the 1956 Law and the 1946 Law.

It has been claimed that the agreement we are proposing to ratify entails serious legal violations. More specifically, Mr. Grilli referred to Article 3 (2), which he read out twice during his speech.

At this point, I am very tempted to repeat the famous saying, "Give me a sentence out of context, and I can send you to the gallows".

If Mr. Grilli, who has read the agreement so carefully, had not ignored certain things, he would have seen that immediately after Article 3, there is an Article 4, which states this:

> "Notwithstanding the provisions of Article 3 of this agreement, both contracting parties retain the right, in periods of currency difficulties, to apply *(a)* exchange restrictions to the extent needed to ensure the availability of foreign exchange required for the payment of goods and services essential to the health and welfare of the people; *(b)* exchange restrictions to the extent needed to prevent the monetary reserves from falling very low, or to slightly increase very low monetary reserves; and *(c)* particular exchange restrictions which are specifically authorized or requested by the International Monetary Fund."

This means that notwithstanding the principle of full freedom set out in the preamble to the international instrument, there is a range of restrictions which are specifically set out in Article 4 which, in periods of currency difficulties, will certainly help to protect the operation that has to be performed. And if, with all these limitations, there should emerge any clash with section 2 of the Investment Law of 7 February 1956, it is obvious that we can find out the general current legal situation governing foreign investment and the transfer abroad of income from Italy by harmonizing the provisions of the 1948 Law and the 1956 Law and the present Bill.

With regard to some of the comments made about the strengthening of certain Italian companies as a result of foreign capital, I have a list before me of American investments in Italy, and — lo and behold! — the main examples are those in which American capital has been invested in companies belonging to the State-owned IRI Group.

With regard to agreements for manufacturing under licence, the type which the Left is so keen on raising, the example I have is the agreement drawn up between an American corporation and the Florence-based "Nuovo Pignone" company which, as you all know, belongs to the State-owned ENI Group. But apart from these considerations, I would like to emphasize the fact that despite the six years that have passed since it was drawn up, this agreement is still as topical as ever, not only because of what I have just said but also in the light of two other aspects of the agreement. And it is very astonishing that neither Mr. Grilli nor Mr. Assennato mentioned these two points. I am referring to the sections dealing with social insurance and international disputes.

As far as social insurance is concerned, the agreement lays down principles regarding the conclusion of a convention under which social insurance rights accrue in both countries. I believe that this is an extremely important principle and one that is particularly favourable towards the working classes in both countries.

Yet — inexplicably — no comment was made on this clause.

Grilli, Giovanni: It was the least you could ask for!

Vedovato, Rapporteur: I could answer that with a well-known English saying: You are throwing the baby out with the bath-water (*Applause from the Centre — murmuring*). We are faced with two very lively and spirited children here: social insurance and the settlement of international disputes.

As far as social insurance is concerned, this is a *pactum de contrahendo* to protect the interests of our migrants

Another part of the agreement makes provision to extend the clause governing the settlement of disputes by arbitration. These provisions make it possible to obviate objections on the grounds of nullity to the detriment of the parties and makes it possible to streamline the settlement of economic and trade disputes, which boosts the development of trade between the two countries, albeit indirectly.

In his speech on 7 October, Mr. Assennato asked why it was that the 1951 agreement was submitted for ratification at the end of 1959, when it had been overtaken in February 1956 by the famous law on foreign investment in Italy. He sought the reasons for this inexplicable delay and made a number of remarks in regard to them. All his arguments were already anticipated in the Minister's report accompanying the instrument. Mr. Assennato, like Mr. Grilli a few moments ago, firstly criticized some of the remarks in the Minister's report which sum up the needs of American investors: the creation of a favourable economic, social and political climate, and the guarantee against political risks. He then pointed out that these things were not mentioned in the agreement, and asked whether they might be contained in some secret accord to freeze the present economic, social and political situation. Mr. Assennato insinuated, without actually saying so in so many words, that this would explain why the agreement was being re-submitted for parliamentary approval after seven years, even though the non-secret part had been superseded in the meantime.

The Government is in a better position than I am to address the question of whether there is a secret international instrument, camouflaged under the guise of an instrument submitted to Parliament. But it is evident that this charge of unconstitutionality and secrecy levelled by Messrs. Assennato and Grilli relate to certain expressions in the report on which they have pounced claiming (and the people who write reports to accompany legal instruments had better watch out!) that these remarks either reveal the existence of a secret agreement against a democratic alternation of parties in power, or a guarantee that it will not occur and claim that, being part of an official document, this relates to the responsibility of members of Parliament.

Now, let me just say — for the sake of clarity and also to dispel any suspicions, doubts or uncertainties that have been expressed — that the ministerial report, which was long-winded and susceptible to biased and one-sided interpretations, was drafted seven years ago, and as usually happens when a Bill is tabled again after the dissolution of Parliament, the only parts that have been changed are the ones that refer to the 1956 law. But when it was originally written, the part of the report that Mr. Assennato criticized does nothing more than confirm the intention not to change the democratic system enshrined in the Constitution of the Republic, which guarantees the preservation of an economic, social and political climate that is favourable to foreign investment precisely by enabling the people to freely choose the men they want to run the country's affairs.

Grilli, Giovanni: Today, people are rebelling against certain guarantees even in Africa.

Vendovato, Rapporteur: You are twisting the issues. One of the bases for developing the Italian economy according to the Vanoni model is to attract foreign investment to Italy, but it is obvious that no such thing exists as a set of rules that will automtically channel foreign investment into Italy; foreign investment only goes to the countries where there are fewer problems. If you prefer to invest capital in Russia, go and invest there; but obviously, if Russia does not guarantee you security, including political security, businessmen will not go and put their capital there.

The parts of the Minister's report that Messrs. Assennato and Grilli particularly attacked related to certain specific demands of the American investors — not specific government assurances that it would create a climate that was favourable to their investment (how could such an assurance be given?), or assurance of "security against political risks" by a sort of immobilism that any democratic government, such as Italy's present Government is, must necessarily shun. The fact is that the comments that have been made, simply for the sake of argument, necessarily referred to certain expressions taken from the report, placing a biased and partisan interpretation on them. But as far as the actual agreement itself is concerned, there were absolutely no grounds for such comments, partly because in both speeches on it, little or nothing was said about the agreement (now Mr. Grilli has spoken about it, and we have demonstrated that the charge of unconstitutionality does not hold water). How could it have been otherwise? Nothing could be said about the agreement because the first part of it, which is certainly the most important, refers to the free transfer of capital and income by natural and corporate persons from the two contracting States, and their freedom to manage the companies which these natural or legal persons establish or procure. It contains a set of provisions which are designed to foster foreign investment in Italy, and especially American investment. At present, despite the long period of time that has elapsed since the supplemental agreement was concluded, they have now become fully relevant in the light of both the liberalizing provisions of the Law of 7 February 1956 governing foreign investment in Italy (of which so much has been said) and of the entry into force of the Treaty of Rome for the establishment of the European Economic Community.

I was saying earlier, and I will say it again, that one of the pillars of the ten-year model is the policy to foster the expansion of loans and foreign investment in Italy. Let us see what the situation was before the entry into force of the 1956 law, and then see what happened after that date. Before the Foreign Investment Law of 7 February 1956, foreign investment had been 6 million dollars in 1951, 15.1 million dollars in 1952, 16.6 million dollars in 1953, 52.6 million dollars in 1954, 70.2 million dollars in 1955, and 99.2 million dollars in 1956, making a grand total of 259.9 million dollars. 1957 was an experimental period for the new Italian foreign investment law and the results were generally positive, despite the unfavourable state of the international capital market as a result of the shortage of funds and the anti-inflationary measures, which led the British to raise the bank rate in October last year. This trend was partly reversed in 1958 but the repercussions were strongly felt.

Since the language of figures is the one we prefer, let me say that foreign investment rose from 89.7 million dollars in 1957 to 172.9 million dollars in 1958, while in the first eight months of the current year they had already reached 126.3 million dollars, most of which came from the dollar area. Indeed, special mention should be made of private investment from the United States which, at the end of 1956, totalled about 206 million dollars.

This kind of investment, which in previous years had been restricted to the oil industry, is now spreading to other particularly vital sectors of the Italian economy. American companies have been stimulated to negotiate technical and production agreements with companies in other European countries and with Australia, as well as with Japanese and New Zealand companies, in order to manufacture more cheaply abroad the things which would cost so much more to make in the United States that they could not compete with the international market prices. This stimulus has coincided (as we hinted earlier) with the steps taken by the countries of the European Economic Community to attract industrial investment in the Common Market, and with the policies adopted by a great many American companies to set up manufacturing bases in the Common Market to carve out a place for themselves inside the citadel of the Common Market.

About 3,000 American companies have been placing industrial investment abroad for a long time, worth some 30 billion dollars. The value of production from these American companies abroad in 1958 was about 32 billion dollars, which was twice the value of America's aggregate exports.

According to the American press, and bearing in mind their needs, and the findings of a well-known American economic research publishing group, in 1959, American industrial corporations intended to increase their foreign manufacturing investments by 5 per cent over 1958 to 2.1 billion dollars, and about the same again in 1960. These figures are supplied by companies that already account for 75 per cent of United States industrial investment abroad. And unlike what happened in the past — and this is the essential point — American companies are reportedly intending to invest more in Europe than in Canada or Latin America in 1959 and 1960. Now, according to these surveys and indications, we have reason to believe that a substantial share of this investment has been, is being, and will be channelled into Italy. This is a source of great satisfaction to everyone who is really concerned about the economic development of our Country. There are basically three forms that American technological and production ventures take in Italy: setting up an industrial plant in Italy under the direct control of the American parent companies; joint-venture agreements with Italian companies (and I just quoted a few actual examples); and granting manufacturing licenses to Italian companies.

Taking all this into account, anyone can see the great relevance of the problem of foreign investment, and United States investment in particular, to the development of the Italian economy. The inflow of foreign investment, particularly from the United States, bringing with it new financial strength which it places at the disposal of Italian industry, is also increasing the supply of capital available to the remaining companies. And it is precisely in this connection that our diplomatic representatives abroad have been given strict instructions from the Italian Foreign Ministry to do what they can to attract foreign investment into Italy by explaining the current statutory facilities available, including the 1956 Law, which have been shown to offer the best guarantees to foreign investors.

This shows how topical the supplemental agreement under discussion really is. To complete the picture, let me add that Article 4 of the agreement contains special provisions for the application of restrictions to the transfer of capital between the two countries in times of currency difficulties which might obviously arise, in order to ensure that they have the liquidity they need to pay for the goods and services that are essential to their well-being.

Let me finish by recalling something that Mr. Assennato said on 7 October:

> "Since my suspicions were aroused, I tried to examine the archives — as I was duty-bound to do — to find the original report given by Mr. Vedovato. Usually, Mr. Vedovato is very punctilious and diligent, but this time he wriggled out of it with three words and a grin."

It may be that I still have that grin even today, but I must point out to Mr. Assennato, who evidently did not read my written report very carefully, that I added a further 33 words orally to the three words of my written report.

I do hope that these explanations and this documentation eliminate all the doubts and all the perplexities, but at least to induce that section (of the House) *(pointing to the Left)* to think again more carefully about their attitude to a measure which, according to the opinion of the Committee, will have beneficial effects on the Italian economy. I therefore move that the House adopt this Bill, with a majority that I really do hope will be overwhelmingly in favour *(loud cheers from the Centre)*.

President: I give the floor to the Under-Secretary of State for Foreign Affairs.

Forchi, Under-Secretary of State for Foreign Affairs: Mr. President, honourable colleagues, the customary vote of thanks to the Rapporteur must be much warmer on my part than usual, because Mr. Vedovato has given a thorough account, answering the comments made during the debate on 7 October by Mr. Assennato, and taken up again, with a few remarks of his own, by Mr. Grilli.

The representative of the Government only needs to briefly sum up the arguments raised, recalling in particular that the criticisms levelled against the Bill relate to three different aspects of it. Firstly, Mr. Assennato spoke of the mystery of the delay in tabling this Bill. Then followed a detailed discussion on the subject-matter of the convention which, according to Mr. Assennato, would appear to be superseded by the 5 February 1956 Law. Lastly, Mr. Grilli brought in a side-issue to the treaty in question.

As far as the delay in tabling the Bill is concerned, I will not inflict on the House a list of all the dates on which the measure went through the pipeline. I will merely add to what Mr. Vedovato has just explained with such diligence that the measure was properly approved by the Chamber of Deputies on 12 February 1953, but that because of the dissolution of Parliament it could not be approved by the Senate. The climate was different then, and the House raised no objections to it *(Protests from Mr. Grilli)*. I could easily quote, Mr. Grilli, from the proceedings of the debate. That would show you that no particular remarks were made about the measure before its ratification, despite the fact that the treaty had only to be signed shortly before that and the financial situation was such that the criticisms raised in this debate were much more in order then than they are today.

The measure was taken up again on 19 October 1953. But although it was set down on the order paper it was not debated and therefore lapsed when Parliament was dissolved. When it was taken up for the third time it was debated in the House. Considering the procedure it has followed, I do not consider that the frequent complaints about the shortcomings or inefficiency of the Foreign Ministry are justified. The Ministry, on this occasion as always, has done its duty with praiseworthy diligence.

With regard to the question as to whether or not the agreement has been superseded, I wholly endorse what has already been said by Mr. Vedovato. First of all, this agreement does not refer solely to capital investment in Italy, but also the submission to arbitration of certain disputes, and the discipline governing certain insurance matters. It is in the interest of everyone that these last two issues are properly regulated. Parliament should therefore take heed of the old Chinese proverb (Chinese proverbs are very fashionable nowadays) which Mr. Vedovato mentioned.

Mr. Grilli expressed his concern that the measure we are about to vote on will offer better terms to foreign investors than the terms provided under the 1956 law. But he forgot to say that in some respects the agreement is more restrictive than the 1956 Law. For example, the 1956 Law provides that capital may be freely transferred even if the original investor has disposed of all or part of the assets acquired in Italy to another foreigner. This provision did not appear in the agreement. Furthermore, the 1956 Law allows investors to transfer capital abroad in a currency other than the currency in which it was originally imported (a provision of considerable relevance and interest), whereas the treaty requires the same currency to be used. In the present international monetary and currency situation, this is of great relevance. Lastly, Article 4 of the agreement confers the right to restrict capital transfers under certain conditions, whereas the Law makes no mention of any such limitations.

Mr. Grilli alluded to substantial available funds in the banks, but he might have recalled, with equal relevance, the substantial funds Italy has available abroad today. If there were any political problem here, it would have to be the problem of mobilizing these huge available reserves both domestically and abroad. But this is not the place to deal with problems of this kind.

I will not dwell on the second and third parts of the agreement, because they do not present problems.

But I would like to go back to the question raised earlier, to which Mr. Assennato referred: namely, the question of the Minister's report which has been put in the dock. What did it actually say? It spoke of the need to create a favourable economic, social and political climate in the countries in which investment is made. Generally speaking, all those who invest capital abroad wish to do so in a country which offers certain guarantees of security, equilibrium and internal peace. No one would doubt that, I imagine. And for the benefit of Mr. Grilli, I should like to re-state, in the words of one of his distinguished Party comrades, the fact that these investments are a necessity for the revitalization of the Italian economy, and this was particularly true at the time the agreement was signed. Unless I am mistaken, way back in 1947, Mr. Pesenti, the Minister of Finance at the time, gave a widely acclaimed lecture in English in Rome, in particularly solemn surroundings, in which he argued the thesis that the reconstruction of Italy needed the intervention of foreign capital. And as Minister of Finance, with the responsibility of laying down the policies our country had to follow, it was logical for him to concern himself with this matter, just as we have since concerned ourselves with it, through a number of instruments. All of us can understand that when this capital came to Italy it needed to find a favourable climate. In all sincerity, this expression, which we agree was unfortunate and to which Mr. Fanfani put his signature just as Mr. Pella had done (because the Fanfani report merely repeated the Pella report, word for word), cannot possibly be construed in the way it has been construed, but was intended to mean something else which is perfectly comprehensible.

Moreover, as far as the favourable conditions for the free repatriation of capital which Mr. Grilli is complaining about are concerned, I hardly need cite the experience and the authority of economists and financiers to recall the fact that the easier it is to recover invested capital, the longer the investment will last. In other words, the greater the certainty that the investor can repatriate his capital at any time, the longer that capital will remain invested in a country.

I wanted to add these comments to facilitate the adoption of the measure by the House, and also because I am duty-bound to say that — contrary to what Mr. Assennato said — there are no secret agreements of any kind whatsoever. But I have to agree with him when he said that the unfortunate expression in that report did not refer to any agreement or provision in the treaty. The Government, through me, hereby declares that nothing has been agreed between it and the United States apart from what is enshrined in this Treaty. It can therefore be adopted, without difficulty, by the House, as far as this matter is concerned.

The agreement has already been ratified by the United States; but I wish to tell Mr. Grilli and the House, in confirmation of what the Rapporteur has just said, that this agreement will not come into force — and could not possibly come into force — until the ratification is exchanged between the parties signifying, according to the sound norms of international law, that the contracting parties are in agreement, and hence that the provisions of that agreement can be put into practice.

Similar agreements have already been made by the United States with West Germany, the Netherlands, and many countries in Latin America, and most recently with France. I therefore believe, as the Rapporteur said in his conclusions, that in all conscience I may move that the House adopt the ratification of the agreement *(Applause from the Centre)*.

President: We will now examine the articles. Please read the clauses (which are identical in both the Committee's and the Government's texts). Since no amendments have been tabled, I put it to the vote.

Franzo, Secretary, reading:

Clause 1

The President of the Republic is authorized to ratify the Supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 Februry 1948, concluded in Washington on 26 September 1951.

(Adopted.)

Clause 2

The Agreement shall come fully into effect on the date of its entry into force as stipulated in Article IX of the Agreement.

(Adopted.)

President: The Bill will be voted through in a secret ballot at another session.

Document 12

SENATE OF THE REPUBLIC, SESSIONS OF THE COMMITTEES, 23 MAY 1960, PAGE 22

[Italian text not reproduced]

SENATE OF THE REPUBLIC — PARLIAMENTARY PROCEEDINGS — SESSIONS OF THE COMMITTEES — PAGE 22 — 23 MAY 1960

The Foreign Affairs Committee, during the reporting stage, subsequently begins the examination of the bill: "Ratification and execution of the Agreement supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951" (931), already passed by the Chamber of Deputies. After a few remarks on the legislative *iter* of the provision on the part of Senators Bosco and Berti, to whom Under-Secretary Russo replies, the Committee confers upon the Rapporteur, Senator Jannuzzi, the mandate to submit the report to the Assembly.

Document 13

SENATE OF THE REPUBLIC, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III 1958-1960, BILLS AND REPORTS, DOCUMENT NO. 931-A, SENT TO THE OFFICE OF THE PRESIDENT, 8 JULY 1960, PAGES 1-3

[Italian text not reproduced]

RATIFICATION AND EXECUTION OF THE AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, SIGNED IN WASHINGTON ON 26 SEPTEMBER 1951

Honourable Senators. The Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed on 26 September 1951, has the following content:

Citizens and juridical persons of each of the Contracting States will not be subject — in the territory of the other country — to arbitrary or discriminatory measures aimed at impeding management or control of enterprises for which they have received the required license to purchase or establish, or any measure aimed at obstructing the exercise of their other rights or interests relative to such enterprises or to those in which they have participated with their capital.

They can employ, irrespective of the professional requirements determined by the legislation of the place where they operate, technical and administrative experts for the purpose of carrying out — in such enterprises — book-keeping inspections, technical surveys, and drafting reports with regard to planning or operating their enterprises.

The Contracting States undertake to grant the most-favoured treatment for the transferability of capital and, in all cases, to allow the free transfer:

(a) of income of any nature (including, therefore, salaries, interests, dividends, commissions, industrial patent rights, payments for technical services and funds for amortization of loans and depreciation of direct investments;

(b) of funds and capital, by obtaining the currency of one's own country for these transfers.

However, in periods of monetary difficulties, exchange restrictions can be applied for the purpose of:

(a) guaranteeing the availability of foreign currency for the payment of goods and services essential to the health and well-being of one's own population;

(b) preventing the drop of monetary reserves to a very low level or producing a moderate increase in very low monetary reserves;

(c) complying with the restrictions authorized or requested by the International Monetary Fund (this rule of course is abandoned after the abolition of this Fund). Tax, customs and tariff allowances concerning transport, established by the Italian legislation for the industrialization of Southern Italy, for the development of the Apuana industrial area and of the Verona, Gorizia, Trieste, Leghorn, Marghera and Bolzano areas "and other allowances set forth by the Italian

legislation" currently in force or which can be enforced "in the future" will be applied to the investments made by the United States in Italy.

The clauses containing the settlement of controversies through arbitration, entered into in the contracts between citizens of both States, will not be considered invalid merely on the basis of the fact that the place chosen for arbitration is outside the territory of the contracting States or the arbiters are not nationals of these States.

Should the same conditions be present, arbitration awards legally rendered will not be considered invalid or non-enforceable either, subject to the rules on judgments giving a foreign sentence legal effect.

The Agreement recognizes the principle of allowing counting of periods of coverage that have accrued in favour of the citizens of each Contracting Country in its own territory when these citizens are working in the territory of the other country, with regard to old-age and survivor's insurance, except for any overlap or duplication, subject to the faculty — for whom it may concern — to waive this rule.

When the 1935 Convention on the maintenance of pension rights of emigrants comes into force, its dispositions will have precedence vis-à-vis the rules contained in this Agreement.

All matters arising from this Agreement supplementing the Treaty will be dealt with on a friendly basis and with appropriate consultations.

The agreeement will come into force on the day of the exchange of ratifications.

The exclusion of any discriminatory treatment or of arbitrary measures causing harm to citizens, juridical persons or Italian or American associations operating in the territory of the other country, the opportunity of free control of enterprises, the most-favoured-treatment granted to transferability of capital, tax relief, etc., are rules which, appropriately supplementing those rules contained in the Treaty of Friendship of 26 September 1951, help the economy, especially the Italian one, since they are aimed at furthering US capital investments in Italy.

The Agreement also contains a rule of juridical and social nature which deserves full approval, namely, the rule guaranteeing to the worker who moves from one State to the other the right to avail himself, in one State, of the benefits achieved in the other country with regard to disability or survivor's insurance. This is in compliance with a healthy principle of safeguarding the worker's rights, irrespective of the place where he/she carries out his/her activity.

The Commission expresses to the Senate its opinion in favour of the ratification of the Agreement.

(Signed) JANNUZZI,
Rapporteur.

BILL

Article 1

The President of the Republic is authorized to ratify the Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian

Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951.

Article 2

The Agreement cited above takes full effect as of the date of its coming into force, in compliance with Article IX of the Agreement itself.

Document 14

SENATE OF THE REPUBLIC, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, SESSION 291ST ASSEMBLY, 19 JULY 1960, PAGES 13758-13759

[Italian text not reproduced]

SENATE OF THE REPUBLIC — PARLIAMENTARY PROCEEDINGS — PAGES 13578 AND 13579 — LEGISLATURE III — 291ST SESSION (MORNING), ASSEMBLY — STENO REPORT 19 JULY 1960

PASSING OF THE BILL: "RATIFICATION AND EXECUTION OF THE AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, SIGNED IN WASHINGTON ON 26 SEPTEMBER 1951" (931).

(Passed by the Chamber of Deputies.)

President: The agenda brings the debate on the bill: "Ratification and Execution of the Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951", already passed by the Chamber of Deputies.

I declare the general debate open.

Since no one calls for the floor, I declare the debate closed.

The honourable Rapporteur has the floor.

Jannuzzi, Rapporteur: What is involved is an agreement supplementing a Convention already entered into, which is aimed at improving more and more the system of investment of United States capital in Italy and of Italian capital in the United States. The Convention, the way it is formulated, appears quite advantageous for the Italian economy. In particular, it displays a social aspect which should not be neglected, since it allows counting of periods of coverage that have accrued in favour of the citizens of each Contracting Country in its own territory when these citizens are working in the territory of the other country, with regard to old-age and disability insurance, except for any overlap or duplication. This principle is socially and juridically just, and for this reason as well, the Convention must be passed.

The Senate can ratify this supplemental Agreement with a clear conscience and in the conviction of doing something useful for the Italian economy.

President: The Honourable Minister of Foreign Affairs has the floor.

Segni, Minister of Foreign Affairs: Mr. President, Honourable Senators, I add my voice to the points raised by the Rapporteur, and I ask the Senate to pass this Convention, whose date, incidentally, is rather far back, so that the delay in passing it is causing harm to our economy.

President: We now move on to the discussion of the articles. I call upon the Secretary to read them.

Russo, Secretary:

Article 1

The President of the Republic is authorized to ratify the Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951.

(It is approved.)

Article 2

The Agreement cited above takes full effect as of the date of its coming into force, in compliance with Article IX of the Agreement itself.

(It is approved.)

President: I put the bill to the vote. Those who are in favour are requested to rise.

(It is passed.)

Document 15

HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, EIGHTIETH CONGRESS, SECOND SESSION, ON A PROPOSED TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC, 30 APRIL 1948

PROPOSED TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC

Friday, 30 April 1948.

United States Senate,
Committee on Foreign Relations,
Subcommittee on Italian Treaty,
Washington, D.C.

The subcommittee appointed to study the proposed treaty of friendship, commerce, and navigation between the United States and the Italian Republic met, pursuant to call, in room 312 of the Senate Office Building, Washington, D.C., at 10 o'clock a.m., Senator Elbert D. Thomas of Utah (chairman of the subcommittee) presiding.

Present: Senators Thomas of Utah and Lodge.

Also present: the Honorable Willard Thorp, Assistant Secretary of State for Economic Affairs; Mr. Winthrop G. Brown, Acting Deputy Director, Office of International Trade Policy and Chief, Division of Commercial Policy; Mr. Walworth Barbour, Chief, Division of Southern European Affairs; and Mr. Vernon G. Setser, Acting Assistant Chief, Division of Commercial Policy, Department of State; Mr. Thomas C. Blaisdell, Jr., Director, Office of International Trade, Department of Commerce.

Senator Thomas of Utah: The committee will please be in order. The committee is meeting today to consider the proposed treaty of friendship, commerce, and navigation between the United States and the Italian Republic.

This is an important day in the development of our relations with Italy. We are opening hearings today on a treaty of friendship and commerce with Italy which is of significance for both our countries. For the United States, it is the first treaty of its kind negotiated with any European country since 1934.

The treaty, furthermore, marks another milestone in the traditionally cordial relations between the Italian and the American peoples. These relations have been marked by our extension of relief and other aid to Italy, our quick ratification of the treaty of peace with Italy, and our passage of the European recovery program in which Italy plays an important role.

For Italy, this treaty is a further development in the resumption of her customary responsible position in the family of nations — a position which, we hope, will soon be fully restored by her admission to the United Nations, a step which I have urged for a long time. Incidentally, there I might say that it became my honor and duty to make the motion and to deliver a speech inviting Italy into the International Labor Organisation in 1945. In this treaty, the first of its kind negotiated by Italy since the return to normal relations, the Italian Government, moreover, has given evidences of support of the liberal principles of business and trade which the United States has advocated for many years.

Now that the Economic Cooperation Administration has begun its operation, it is of the highest importance that normal commercial relations with the participating countries be reestablished so that the greatest possible use can be made of private channels of trade, as specified by the provisions of the Economic Cooperation Act. The present treaty, therefore, provides a stable framework within which American businessmen, with assurances of protection and absolutely fair treatment, can make a great contribution to the success of the European recovery program and the revival of the Italian economy with the many mutual benefits which can be derived from these two important objectives.

Now I would like to ask some questions in a rather categorical manner dealing with the treaty and the background leading up to the treaty. Some of these questions we will ask Mr. Blaisdell to answer and some Mr. Brown, so that if they all will offer the answers when they have them I will appreciate it, because it is background and foundation that we need in dealing with the treaty.

ALIEN PROPERTY

First of all, how does this treaty affect our Alien Property Custodian's work in the United States?

Mr. Brown: It does not affect it at all, sir.

Senator Thomas of Utah: In other words, all that the Alien Property Custodian may have of Italian property will be administered and the property will be returned or adjudicated, or whatever it is they do with it, entirely independent of any provisions in this treaty.

Mr. Brown: That is correct, sir, and after it goes back to the Italian national, then he is able to claim the rights under the treaty.

Senator Thomas of Utah: Those, then, are the rights of an ordinary Italian citizen, and not a former alien enemy.

Mr. Brown: Yes, sir.

Senator Thomas of Utah: Do we need any more information with regard to that, Mr. Brown? Can I say categorically that the treaty in no way affects any of the relationships which come about as a result of the administration of the Alien Property Custodian law?

Mr. Brown: That is my understanding, Senator.

Senator Thomas of Utah: One more of a general kind: Is there anything in this treaty which will in any way affect any cases which we may have under the Trading with the Enemy Act?

Mr. Brown: No, sir.

Senator Thomas of Utah: Ordinarily, the Trading with the Enemy Act is a prohibition against American citizens; is it not? Still, as this is a mutual commercial treaty, we may have cases dealing with American citizens under that act which might in some way be related to this treaty. Can any of you think of anything that we should know about?

Mr. Brown: It is my impression, Senator, that there is no possible conflict there, but I would like to check that specific question with our legal people and give you a firm memorandum by tomorrow.

(The matter referred to is as follows:)

RELATIONSHIP OF TREATY WITH ITALY TO THE TRADING WITH THE ENEMY ACT

It is the understanding of the Department of State that there is no conflict between the present proposed treaty and the Trading with the Enemy Act or regulations issued thereunder, and that the treaty will interfere in no way with the functions of the Alien Property Custodian. The provisions of the treaty relating to property are not intended to apply to situations in which the property of the nationals of Italy are controlled in this country as a result of a state of war. There are treaty commitments with respect to the protection and disposition of property in a number of treaties now in force between the United States and other countries, and these provisions have not been invoked with respect to situations resulting from a state of war. It is thought that, in most instances, measures taken under the Trading with the Enemy Act would be covered by an express exception in Article XXIV, paragraph 1 *(e)*, of the treaty with Italy for measures taken "for the protection of the essential interests of the country in time of national emergency".

Senator Thomas of Utah: And if there is anything that should go in the record in relation to either the Alien Property or the Trading with the Enemy Act, I would like to know about those things in a rather substantial way; not long, but so that I can be positive in the answers I give.

Mr. Brown: We will try to give it to you in one sentence.

Senator Thomas of Utah: Fine.

TREATY OF 1871

In 1937 the 1871 Treaty of Commerce with Italy was terminated. Why was that treaty terminated?

Mr. Setser: There were certain provisions in it which were not being applied by the Fascist Government wholly to the advantage of American interests, and for that reason it was mutually agreed to terminate the treaty.

Senator Thomas of Utah: The treaty was not renounced by the United States?

Mr. Setser: No, sir. A new treaty was negotiated and agreement reached upon the provisions but it was not concluded for the reason that there was the question involved of the recognition by the United States of the conquest of Ethiopia, and the treaty fell for that reason.

Senator Thomas of Utah: Then the fact that Italy had moved into Ethiopia made the new treaty impossible, so that there were international political aspects when it came to writing a new treaty, is that correct?

Mr. Setser: That is correct.

Senator Thomas of Utah: But there were no international complications — that is, international political complications — aside from disagreement with Fascist theories, that caused us to renounce the treaty of '71, is that correct?

Mr. Setser: No, sir. It was wholly considerations affecting the commercial provisions which were not adapted to the situation existing in 1937.

EXISTING TREATY RELATIONSHIPS

Senator Thomas of Utah: Since the termination in 1937 of the 1871 Treaty of Commerce with Italy what, if any, treaties are in effect between Italy and the United States, apart from the peace treaty of 1947?

Mr. Thorp: There are a number of treaties which have been revived, and I think perhaps the most helpful thing would be for me to offer the press releases from the Department of State in connection with these matters.

(The matter referred to is as follows:)

DEPARTMENT OF STATE

For the Press February 11, 1948.
No. 108.

The Department of State announced today that on February 6, 1948, the Italian Government was given official notification, in accordance with the terms of the Treaty of Peace with Italy signed at Paris February 10, 1947, regarding the pre-war bilateral treaties and other international agreements with Italy which the United States Government desired to keep in force or revive. Following is the text of the note from the American Ambassador at Rome to the Italian Minister for Foreign Affairs giving such notification:

I have the honor to refer to the Treaty for Peace with Italy signed at Paris February 10, 1947, which came into force, in accordance with the provisions of Article 90 thereof, on September 15, 1947, upon the deposit of instruments of ratification by the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and France. Article 44 of the Treaty of Peace reads as follows:

> "1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present treaty, which of its prewar bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present treaty shall, however, be deleted from the above-mentioned treaties.
>
> 2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.
>
> 3. All such treaties not so notified shall be regarded as abrogated."

I have the honor, by direction of the Government of the United States of America and on its behalf, to notify the Italian Government, in accordance with the provisions of the Treaty of Peace quoted above, that the Government of the United States of America desires to keep in force or revive the following prewar bilateral treaties and other international agreements with Italy:

Arbitration

1. Arbitration treaty. Signed at Washington April 19, 1928. Ratified by the United States May 15, 1928. Ratified by Italy November 27, 1930. Ratifications exchanged at Washington January 20, 1931. Effective January 20, 1931. (*Treaty Series* 831, 46 Stat. 2890.)

Aviation

2. Air navigation arrangement. Effected by exchange of notes signed at Washington October 13, and 14, 1931. Effective October 31, 1931. (*Executive Agreement Series* 24; 47 Stat. 2668.)

Conciliation

3. Treaty for the advancement of peace. Signed at Washington May 5, 1914. Ratified by the United States March 17, 1915. Ratified by Italy November 29, 1914. Ratifications exchanged at Washington March 19, 1915. Effective March 19, 1915. (Article II was abrogated and replaced by Article I of the treaty of September 23, 1931). (*Treaty Series* 615; 39 Stat. 1618.)

4. Treaty modifying the terms of Article II of the treaty to advance the cause of general peace of May 5, 1914. Signed at Washington September 23, 1931. Ratified by the United States June 25, 1932. Ratified by Italy February 18, 1932. Ratifications exchanged at Rome July 30, 1932. Effective July 30, 1932. (*Treaty Series* 848; 47 Stat. 2102.)

Consuls

5. Consular convention. Signed at Washington May 8, 1878. Ratified by the United States June 4, 1878. Ratified by Italy July 9, 1878. Ratifications exchanged at Washington September 18, 1878. Effective, September 18, 1878. (Article XI, which was annulled by the Convention of February 24, 1881, and Article XIII, which was abrogated under act of Congress approved March 4, 1915, are not to be considered as revived by this notification.) (*Treaty Series* 178; 20 Stat. 725.)

Debt funding

6. Debt-funding agreement. Signed at Washington November 14, 1925. Effective as of June 15, 1925. (Combined Annual Reports of the World War Foreign Debt Commission (1927) p. 222.)

7. Agreement modifying the debt-funding agreement of November 14, 1925 (moratorium). Signed at Washington June 3, 1932. Effective as of July 1, 1931. (Published by the Treasury Department, 1932.)

Extradition

8. Extradition convention. Signed at Washington March 23, 1868. Ratified by the United States June 22, 1868. Ratified by Italy July 19, 1868. Ratifications exchanged September 17, 1868. Effective September 17, 1868. (*Treaty Series* 174; 15 Stat. 629).

9. Additional article to extradition convention of 1868. Signed at Washington January 21, 1869. Ratifications exchanged at Washington May 7, 1869. Effective May 7, 1869. (*Treaty Series* 176 (printed with 174); 16 Stat. 767.)

10. Supplementary convention to extradition convention of 1868. Signed at Washington June 11, 1884. Ratified by the United States April 10, 1885. Ratified by Italy August 8, 1884. Ratifications exchanged at Washington April 24, 1885. Effective April 24, 1885. (*Treaty Series* 181 (printed with 174); 24 Stat. 1001.)

Narcotic drugs

11. Arrangement for the direct exchange of certain information regarding the traffic in narcotic drugs. Effected by exchange of notes signed at Rome, January 5, and April 27, 1928. Effective April 27, 1928. (*Treaty Information Bulletin* No. 5 (July 1929) 2d supp.)

Navigation

12. Agreement relating to the reciprocal recognition of certificates of inspection of vessels assigned to the transportation of passengers. Effected

by exchange of notes signed at Washington June 1, August 5, and August 17, 1931. Effective August 15, 1931. (*Executive Agreement Series* 23; 47 Stat. 2665.)

Passport visa fees

13. Agreement relating to the waiver of passport visa fees for nonimmigrants. Effected by exchange of notes signed at Rome February 11, 21, and 26, 1929. (Not printed.)

Postal

14. Convention relating to exchange of money orders. Signed at Washington March 31, 1877, and at Florence April 20, 1877. Effective July 2, 1877. (20 Stat. 683.)

15. Additional convention to the convention relating to exchange of money orders signed at Washington March 31, 1877, and at Florence April 20, 1877. Signed at Washington August 24, 1880, and at Rome August 9, 1880. Ratified by the United States August 25, 1880. (21 Stat. 788.)

16. Parcel Post Convention. Signed at Washington October 11, 1929. Ratified by the United States October 18, 1929. (Post Office Department print; 46 Stat. 2397.)

Taxation

17. Arrangement for relief from double income tax on shipping profits. Effected by exchange of notes signed at Washington March 10, and May 5, 1926. Effective from January 1, 1921. (*Executive Agreement Series* 10; 47 Stat. 2599.)

Trade-marks

18. Declaration for the reciprocal protection of marks of manufacture and trade. Signed at Washington June 1, 1882. Effective June 1, 1882. (*Treaty Series* 180; 23 Stat. 726.)

This notification will be deemed to be effective on the date of the present note.

It is understood, of course, that either of the two Governments may propose revisions in any of the treaties or other agreements mentioned in the above list.

Further, it shall be understood that any of the provisions in the treaties and other agreements listed in this notification which may be found in particular circumstances to be not in conformity with the Treaty of Peace shall be considered to have been deleted so far as the application of the Treaty of Peace is involved but shall be regarded as being in full force and effect with respect to matters not covered by the latter treaty.

The reciprocal copyright arrangement between the United States and Italy effected pursuant to the exchange of notes signed at Washington, October 28, 1892, and the exchanges of notes signed at Washington, September 2, 1914, February 12, March 4, and March 11, 1915, will be the subject of a separate communication.

The agreement for the protection of trade-marks in Morocco, effected by exchange of notes signed at Tangier June 13, July 29, and December 19, 1903, and March 12, 1904, will also be the subject of a separate communication.

In compliance with paragraph 2 of Article 44 of the Treaty of Peace, quoted above, the United States Government will register with the Secretariat of the United Nations the treaties and other agreements which are by this notification kept in force or revived.

* * *

DEPARTMENT OF STATE

For the Press.

March 16, 1948.
No. 207.

In the notification given to the Italian Minister for Foreign Affairs on February 6, 1948, regarding the prewar bilateral treaties and other international agreements with Italy which the United States Government wished to revive or keep in force (see press release 108 of February 11, 1948) it was stated that the reciprocal copyright arrangement and the agreement for the protection of trade-marks in Morocco would be the subject of a separate communication. Following is the text of a note delivered on March 12, 1948, to the Italian Foreign Office by the American Embassy at Rome:

"I have the honor to refer to my note of February 6, 1948, giving official notification, in accordance with Article 44 of the Treaty of Peace with Italy dated at Paris February 10, 1947, regarding the prewar bilateral treaties and other international agreements with Italy which the United States desires to keep in force or revive. It was stated in that notification that the reciprocal copyright arrangement between the United States and Italy and the agreement for the protection of trade-marks in Morocco would be the subject of a separate communication.

I have the honor to inform you now that the Government of the United States of America wishes to include the reciprocal copyright arrangement between the United States and Italy effected pursuant to the exchange of notes signed at Washington October 28, 1892, and the exchanges of notes signed at Washington September 2, 1914, February 12, March 4, and March 11, 1915, among the prewar bilateral treaties and other international agreements with Italy which the United States desires to keep in force or revive. Accordingly, it is understood that the afore-mentioned arrangement will continue in force and that the Government of each country will extend to the nationals of the other country treatment as favorable with respect to copyrights as was contemplated at the time the arrangement was entered into by the two countries.

The Government of the United States of America also desires to continue in force or revive the agreement for the protection of trade-marks in Morocco, effected by exchange of notes signed in Tangier June 13, July 29, and December 19, 1903, and March 12, 1904."

* * *

Mr. Thorp: The subject-matters involved are copyrights, arbitration — this is not a commercial arbitration but a political arbitration treaty — aviation, conciliation, consular convention, debt funding agreement — which has to do with the moratorium of 1925 — extradition convention, narcotic drugs, navigation, passport visa fees, postal conventions, arrangement for relief from double tax on shipping profits, and trade-marks. That is the list of the previously existing treaties which have been revived by declaration by this Government.

Senator Thomas of Utah: Revived as a result of the peace treaty of 1947?

Mr. Thorp: As a result of the peace treaty, which gave authority to revive them on such notification. Any other treaties which were not so notified lapse under the peace treaty.

Senator Thomas of Utah: That is, there remained in the United States the power to revive or the power to not revive any agreements that existed before the war?

Mr. Thorp: That is correct.

ACTION BY THE ITALIAN GOVERNMENT

Senator Thomas of Utah: What steps have been taken by the Italian Government to ratify this treaty, Mr. Thorp?

Mr. Thorp: We have been informed by the Italian Embassy that the Italian Government wishes to proceed in parallel with the United States on the matter of ratification. The newly elected Italian Parliament convenes on May 8. They will undoubtedly have certain organization business to do, but it is our expectation that this will be considered by them as soon as practical after May 8. In other words, there is approximately a parallel consideration by the Italian Parliament and by our Congress of the treaty.

RELATIONSHIP TO PEACE TREATY

Senator Thomas of Utah: What is the relationship of this treaty to the treaty of peace with Italy?

Mr. Thorp: The treaty of peace with Italy contained in Article 82 some general economic provisions which were to be applied for a period of 18 months. I can say, because I was involved in negotiating this article, that the provision was intended to govern the situation while it was possible to negotiate more elaborate treaties, and it was for that reason that the peace treaty contains a rather general formula for an 18 months' period. There is nothing in this proposed treaty which is in conflict with the peace treaty. We have had it examined by the legal adviser's office in the Department of State and have such an opinion. There is nothing in this treaty that would prevent the revision of the peace treaty if that should be desirable, or that bears on one of the most important undetermined problems, and that is the final disposition of the Italian colonies.

Senator Thomas of Utah: Will you say something about that? Will this disposition have any effect upon this treaty under consideration?

Mr. Thorp: No, it would not. It would, I suppose, follow that if some or all of the Italian colonies were returned to Italy, then this treaty would have a bearing on the applicable procedures in those colonies.

Senator Thomas of Utah: That is, the treaty would be extended to cover the colonies?

Mr. Thorp: Yes; that is correct.

Senator Thomas of Utah: Does the treaty reach the colonies today?

Mr. Thorp: No, I do not think it does. Those colonies today are not under the jurisdiction of Italy.

Senator Thomas of Utah: Under whose control are they?

Mr. Thorp: May I ask Mr. Barbour?

Mr. Barbour: The colonies were surrendered by the peace treaty, and in accordance with the decisions of the Council of Foreign Ministers, a commission is now examining with a view to reporting its findings at an early date concerning the disposition of the colonies. If within a year no decision is made, the question of their disposition goes to the United Nations.

Senator Thomas of Utah: Who administers the government in those colonies at the present time, an inter-Allied commission of some kind?

Mr. Barbour: They are still under British military administration.

Senator Thomas of Utah: The British have all of them?

Mr. Barbour: The British military mission is in all of them, I think.

COMPARISON WITH PREVIOUS TREATIES

Senator Thomas of Utah: In what way does this treaty constitute a departure from prewar commercial relationships with European colonies, Mr. Thorp?

Mr. Thorp: There are a number of new developments in connection with treaties which are signified in this case. In the first place, one of the conspicuous differences is the general recognition of the rise of the corporation as an important economic instrument.

CORPORATIONS

Senator Thomas of Utah: When you speak of "corporation", that immediately arouses something in my system, or in me, because of the Fascist or Mussolini's theory of the corporate state. Is there any relationship?

Mr. Thorp: No, there is no relationship at all. I am thinking of the corporation merely as a form of organization for doing business in the sense in which we have corporations in this country.

Senator Thomas of Utah: A body created by law.

Mr. Thorp: That is correct.

Senator Thomas of Utah: And "corporation" in Italy means the same as "corporation" in the United States, and wherever the word is used in this treaty it has the same legal significance as it has within the United States? Is that true?

Mr. Thorp: That is true except, of course, as between different countries there are differences in corporation law in its details, but fundamentally it is correct that we are talking of this form of economic organization with which we are all familiar.

Senator Thomas of Utah: It has nothing at all to do with the old political concepts?

Mr. Thorp: It has nothing to do with a corporate state which was a highbrow name for the old Nazi organization in which whole industries were organized on a basis of a central control.

Another element that is new in this treaty is the paragraph with the article in it relative to freedom of information. This is a new type of provision and, I think, is perhaps one of the most important new developments. This is in Article XI in the treaty.

Then there are a series of provisions having to do with exchange difficulties which are necessary because of the monetary problems that have developed since the war, and recognition of those and protection against discriminatory operation in connection with exchange controls.

Then there is a new approach to the problem of what happens when a government goes into business and then the necessity, if there remain private enterprises in competition, for a fair opportunity being given to those competing private enterprises, and there is in this treaty a provision creating obligations for fair treatment of private enterprises when they are in a position of competition with public enterprises. In the past there have been — I think perhaps they are tightened up in this treaty — provisions with respect to a complete change; that is, nationalization, but now I am referring particularly to cases where there exist side by side public and private operation.

Those are the chief new developments that occur to me. Do you have any to add, Mr. Brown?

Mr. Brown: No; those are the major ones.

FREEDOM OF INFORMATION

Senator Thomas of Utah: Tell us a little more about the information provision, Mr. Thorp.

Mr. Thorp: This is the first treaty to come before the Senate which has contained a specific provision for giving effect internationally to the ideal of freedom of information. This principle is already endorsed by the Congress in a concurrent resolution adopted in 1944, and the United Nations Conference on Freedom of Information at Geneva has recently completed a formulation of certain recommendations looking toward a multilateral approach to this problem. The provision in the present treaty offers a minimum standard of treatment which we hope may be included in many bilateral treaties hereafter and which should provide worthwhile protection for American nationals engaged in information activities. When I describe it in terms of Americans in Italy, of course this is a mutual treaty and the same privileges would be given to Italians in the United States.

It permits nationals, corporations, and associations to engage in such activities in the other country as writing, reporting, gathering of information for dissemination to the public; it provides freedom of transmission of material to be used abroad for publication by the press, radio, motion pictures, and other means. It provides freedom of publication in the territories of the other party under whatever may be the applicable laws and regulations on the same terms as nationals may have in that country. It does not provide a special privilege, in other words, but it provides a national treatment in connection with publication.

The term "information" as agreed to here refers to printed matter, motion pictures, recordings, photographs, written communications of all kinds.

Senator Thomas of Utah: Does anyone have anything to add to that?

PROTECTION FOR AMERICAN BUSINESS

What new features and protections are provided for American business? For example, protection against discriminatory exchange?

Mr. Brown: The treaty recognizes the fact that it may be necessary, under certain circumstances, when there are great shortages of exchange, to exercise control. The main thing that the treaty does is to provide that when such controls are necessary they must be exercised in a nondiscriminatory manner, and that where there are limitations on the transfer of dollars, for example, everybody should get the same treatment, both in terms of exchange rate and in the share of the amount of dollars proportionately that they are allowed to take out. The principle of nondiscrimination is the basic one.

Senator Thomas of Utah: You already mentioned State trading and monopolies. Have you anything more to say about that — the ideas behind trading by State and monopolies?

Mr. Brown: The treaty provides that where either party engages in State trading, the State-trading organization must be guided in its operations by the ordinary commercial principles of price and quality and terms of sale and that type of thing that the ordinary businessman would be controlled by in a completely private-enterprise system. I think it is only fair to say that that is a difficult standard to administer, but it sets a principle and it gives an opportunity for representations if it is not lived up to.

And the second thing that the treaty does is that it provides that if the state-trading enterprise gets any particular benefits from the Government, those benefits must be extended similarly to the private enterprise of the other country if it is in competition in the same business. That is to say, if there were an American corporation doing business in Italy and there were an Italian state-trading enterprise engaged in the same business, the American firm would be entitled to receive any, shall we say, tax exemption or special privilege which was accorded to the competing Italian State enterprise, and vice versa.

STATE TRADING

Senator Thomas of Utah: This provision, your state-trading and monopoly idea, the actual monopoly, is a rather one-sided provision. Are you not thinking more of Italy than you are of ourselves?

Mr. Brown: Yes, of course; the Italians are much more likely to use that form of enterprise than we would be.

Senator Thomas of Utah: Do you call those corporations that traded under the China Trade Act of '22 state-trading organizations?

Mr. Brown: No, sir. They are simply a private corporation incorporated under a Federal law instead of a State law.

Senator Thomas of Utah: And organized for the purpose of trade? But we did not do any State trading, did we, under that act?

Mr. Brown: Oh, no. They were purely private enterprises, and in fact the only way in which they were different from any other corporation was, first, that they had a Federal charter instead of a State charter; and secondly, that they received certain tax exemptions in this country.

Senator Thomas of Utah: In our system, have you an example of State trading at all?

Mr. Brown: Oh, yes. The Government does a good deal of procurement. The Treasury Department buys; the Agriculture Department buys grain; the Metals Reserve Corporation used to buy for stock piling; the Rubber Reserve Corporation bought rubber; so that we have had in this country a certain amount of State trading, and that would be a kind of State trading enterprise.

Senator Thomas of Utah: The treaty will not interfere with that.

Mr. Brown: It will not interfere with that. It will cover the situation that if there should be an Italian corporation doing the same thing, we would have to give them fair treatment, but we think the chances of that are pretty remote.

Senator Thomas of Utah: Have we a private monopoly at all in America that we have to think about?

Mr. Brown: A private monopoly would not come under this clause at all.

Senator Thomas of Utah: It is not recognized in this at all?

Mr. Brown: There is a provision in the treaty which says that the parties recognize that business practices restraining competition — in words, cartel practices and monopolies — are undesirable, and if the nationals of either get in trouble in that kind of situation there will be consultation to see what can be done about it. That is the only case in which it is mentioned.

Senator Thomas of Utah: In other words, these provisions, so far as the United States is concerned, are put in there for the benefit of our own traders against what might happen in the other country?

Mr. Brown: That is the principal idea that we had in mind.

NATIONALIZATION

Senator Thomas of Utah: In the same way, nationalization and expropriation — are we thinking primarily of what might happen in Italy, too, there?

Mr. Brown: Oh, yes.

Senator Thomas of Utah: Have we any example of nationalization, aside from stock piling?

Mr. Brown: We would have examples of expropriation under eminent domain, but it would be our normal practice to give prompt and just satisfaction in terms of convertible currency.

Senator Thomas of Utah: We have never considered eminent domain as being a practice that brought about confiscation; have we?

Mr. Brown: No, sir. It is something that is done rarely, and then only on fair and full compensation adjudicated by the Court.

Senator Thomas of Utah: Do you think this treaty is powerful enough to extend those theories, so far as our citizens are concerned, to Italy?

Mr. Brown: There is a formal commitment in the treaty stating that the Italian Government will give prompt, just and effective compensation. The difficulty that is likely to come up there would be the difficulty of providing the foreign exchange to our national in payment for his property, and on that score we are covered in the exchange provisions. We get the best treatment, or as good treatment as either an Italian national or the national of any other country gets. That is the most you can do if there just are not enough dollars to go around.

EFFECT OF THE PROTOCOLS

Senator Thomas of Utah: The two protocols beginning on page 23 of the Senate document seem to cancel out some of the treaty. What is the effect of these two protocols, Mr. Thorp?

Mr. Thorp: I think perhaps Mr. Brown had better answer that.

Mr. Brown: The first protocol is mainly corrective. The second one recognizes the current difficulties in which Italy finds herself because of the shortage of foreign exchange, and it relaxes some of the provisions of the treaty which obligate Italy to give advantageous treatment with respect to foreign exchange when they are in a condition where their reserves are very low or where they are in real balance-of-payment difficulties, and it was felt that it was better to get a good, firm, satisfactory rule in the treaty itself, which would last for the long term, and then recognize what we hope will be the transitional difficulties of the current period in a protocol giving, so to speak, a temporary waiver of those provisions, than it would be to take a weaker provision in the treaty itself.

The protocol, generally speaking, permits the Italians to depart — this is principally for the benefit of Italy, of course — somewhat from the rules in the treaty with respect to foreign exchange by imposing restrictions which would be permitted under the articles of agreement of the Monetary Fund, or restrictions on the transfer of exchange which are similar to those which we have negotiated with other countries in such documents as the general agreement on tariffs and trade recently concluded at Geneva. But this is simply a recognition of the fact that when a country is extremely short of dollar exchange, it will have to take some very tight control, and sometimes discriminatory control, measures, simply to get what it must have in order to survive, and it is in our interest as well as theirs to recognize that fact, but simply to be sure that they do not do it except when they really need to.

Senator Thomas of Utah: In other words, your hope is that the protocol provisions will be temporary?

Mr. Brown: Paragraph 2 of the additional protocol states that the provisions which it gives are limited to situations where it is necessary for Italy to restrict imports in order to forestall serious decline in monetary reserves, or to get necessary imports which they could not possibly get in any other way. Those are the only cases in which it applies.

ITALIAN TREATY OMITS COMMERCIAL ARBITRATION

Senator Thomas of Utah: The Italian treaty omits mention of commercial arbitration which is included in the China treaty. What is the reason for this?

Mr. Thorp: In this case, Mr. Senator, the provision in the China treaty was a difficult one for the Italians to accept because of their belief that it was incompatible with their own Italian law. This is not left out because of a fundamental disagreement with respect to the desirability of commercial arbitration, but the difficulty of finding a formula that was acceptable. As you, of course, know, the problem with these treaties arises from the fact that we have certain things which we should like, from the American point of view, to place in the treaties, but we know that when we arrive at agreement with the other country there will be deviations among all of the treaties. It does not mean that there is a difference in our American approach, but that there necessarily must be some adaptation to the wishes of the other country and their legal position.

This particular case is one where we have had difficulty in working out something that will fit both of our legal structures with respect to arbitration.

REFERENCE TO SOCIAL-SECURITY PROVISIONS

Senator Thomas of Utah: The reference to social security and other compulsory insurance schemes is an innovation in this kind of treaty, is it not?

Mr. Brown: Yes, sir, Senator.

Senator Thomas of Utah: Why is it in the treaty?

Mr. Brown: The Italians really were the spark plug on this provision. They were very anxious to work out some extremely elaborate provisions about social-security benefits with which we were not able to go along, and this brought a modest provision which simply says that either party can have the benefit of the schemes in effect in the other country. That was what we finally came out with.

Senator Thomas of Utah: What is the practical aspect of this? Take a concrete example of an Italian national who has been working in our country. He has a social-security number here and goes over and works in Italy. Does he take any equity with him?

Mr. Brown: No more than if he went to any other country. Nothing in the treaty would give him any benefits except what he would be entitled to under his social-security number.

Senator Thomas of Utah: Now then, reverse it.

Mr. Brown: I think this would say that you could not exclude an Italian citizen resident here and otherwise entitled to social security.

Senator Thomas of Utah: In other words, if you are giving social security to all of the workmen in some big corporation in our country, if an Italian immigrant comes in and gets a job, he will enjoy the same rights of social security, and he will have to live up to the same obligations?

Mr. Brown: That is correct.

Senator Thomas of Utah: And he will not be treated in any way different from the American national. If he quits his job, whatever he is entitled to he gets, and what he is not entitled to he cannot get, even if Italian law — and he may still be having some advantages over in Italy from an old social-security arrangement — is more liberal.

Mr. Brown: Oh, yes. All he gets is what the American gets under the American law. And all the American national in a comparable position in Italy gets is what the Italian would get under the Italian law.

Senator Thomas of Utah: We are not in any way modifying our Social Security Act?

Mr. Brown: No indeed.

Senator Thomas of Utah: All right.

FREEDOM OF INFORMATION

Article XI, section 2, contains a "freedom of information" provision. That has been mentioned. Now let us see if there is something more we want to ask about that. It was suggested that it is new.

Mr. Thorp: Yes; this is new.

Senator Thomas of Utah: Give us the relationship between the article and what we have attempted to bring about in the World Conference on Freedom of Information at Geneva, Mr. Thorp.

Mr. Thorp: I think they are both directed at the same objective. Our fundamental objective is to achieve all that is meant by the phrase "freedom of information" — the opportunity of individuals to go in and make inquiry, regardless of what the jurisdiction over the area may be; their freedom to send reports out and the freedom of publication within the area as much as freedom may exist within the area. There is no distinction, really, between the objectives that are incorporated in this treaty and the objectives of our delegation at the recent conference.

Of course, at that conference there was a great deal more in the way of elaboration of such problems as who was responsible for honesty on the part of the press, and so forth. But this is really taking action as between ourselves and Italy in a field in which the United Nations is trying to write policy but has not yet reached a point where action as such is on the horizon.

Senator Thomas of Utah: Can we go so far as to say that what we are doing is quite experimental?

Mr. Thorp: I think that is true. I think I would prefer to call it pioneering rather than experimental. It is a new area.

Senator Lodge: What is the United Nations doing about it?

Mr. Thorp: The Freedom of Information Conference, which has recently been held was for the purpose of trying to develop an international opinion which might be incorporated into conventions or a multilateral agreement that would establish certain principles with respect to freedom of information.

COMPARISON WITH PREVIOUS TREATIES

Senator Lodge: Has the State Department made a list anywhere of the features of this treaty which are different from what we have done in the past?

Mr. Thorp: I have summarized that briefly in an earlier statement, but we can make a very exact and formal statement on it if you would like.

Senator Lodge: I would like to have it exact. I do not want to have it too formal. I would like just a general idea of how this is different from what we usually do. That is, after all, what we have to confront up here. Can you do that? It seems to me it is pretty hard to reach a decision on a matter of this kind which is as long as this is, and as intricately written as this, unless you know what is new and what is merely repeating the traditions.

Mr. Thorp: I think the total picture should be clear if you take the material that was presented to this committee with respect to the China treaty, where there was a fairly general discussion of both the standard provisions and some new provisions, and if we incorporate in the record, or if I present the statement which I have prepared, which outlines things that are new in this treaty or things which are different from the China treaty —

Senator Lodge: Can you not save us the labor by comparing the whole thing? Can you not give us a brief list of the things in this treaty that are new?

Mr. Thorp: I will be glad to give it to you or to outline again, if Senator Thomas wants me to, a brief list that I gave before.

Senator Thomas of Utah: I think as a sum-up of what has already been said in answer to Senator Lodge's question, we could have it all in one paragraph.

Mr. Thorp: All right.

Senator Lodge: You can see for yourself the things that are traditional, that we have always done, are matters that on the committee we can put to one side, but things that are new are the things that we can put the magnifying glass on.

Mr. Thorp: We will prepare such a statement.

(The statement is as follows:)

Comparison of the Treaty with Italy, Signed February 2, 1948, with Previous Treaties of Friendship, Commerce, and Navigation Concluded by the United States

In the period from 1923 to 1938, during which the Department of State was engaged in an extensive program directed to the conclusion of treaties of friendship, commerce, and navigation, about a dozen treaties of this general type were concluded, including treaties with Germany (1923), Austria (1928), El Salvador (1926), Finland (1934), Honduras (1927), Hungary (1925), Norway (1928), Latvia (1928), Poland (1931), Siam (1937), and Liberia (1938). These treaties differ among themselves as to detail but are generally similar. The last two in the group, the treaties with Siam and Liberia, have more points in common with the treaty with Italy now under consideration, than do the earlier ones in the group.

For the purpose of more detailed comparison with the treaty with Italy, the treaty with Norway, signed at Washington June 5, 1928 (IV Treaties (Trenwith) 4527), may be taken as representative of the group enumerated in the preceding paragraph. There are a few quite obvious differences between the two treaties. The Norway treaty deals extensively with consular rights. This is true of most, but not all of the treaties in the 1923-38 group. It is now the practice of the Department of State to deal with these matters in separate consular conventions.

Much subject-matter is common to the two treaties and the standards of treatment established is the same in a large number of the provisions. In the treaty with Italy, however, most of the provisions have been restated with the object of making them more specific, more explicit, of adapting them more fully to the coverage of situations which experience has indicated are likely to arise, and of bringing them wherever practicable into more complete accord with United States law and judicial decisions thereunder.

There follows a tabular comparison of the provisions of the two treaties.

(Note). — The statements in the following tabulation are designed to provide guidance to, and to facilitate the consultation of, the provisions of the two treaties to which they refer, and should not be construed as interpretations of those provisions.)

Subject	Treaty with Italy	Treaty with Norway
1. Entry of persons	Arts. I (1,3), XXIV (7). Rights of entry, travel and residence, limited by reservation covering immigration laws.	Art. I and Additional Article. Provisions comparable, though differently stated.
2. Activities of persons	Art. I. Rights to carry on specified activities on national treatment basis, and to acquire buildings and lease lands for specified purposes.	Art. I. Provisions comparable, though differently stated. List of activities somewhat more restricted than in Italian treaty.
3. Recognition of status of corporations	Arts. II (2), V (4). Juridical status to be recognized and access to courts permitted.	Art. XII. Provisions comparable.
4. Activities of corporations	Art. II (3). Rights to carry on specified activities on national treatment basis.	Art. XII. No comparable provisions. Activities of corporations made wholly subject to local laws.
5. Participation in domestic corporations	Art. III (1). Rights to participate in, manage and control corporations for any purpose on most-favored-nation basis. Art. III (2). Unqualified right to participate in, control and manage corporations for specified activities. Art. III (3). Right for domestic corporations participated in, managed or controlled by nationals of other party to carry on specified activities on basis of national treatment.	Art. XIII. Rights much less extensive than in Italian treaty. Most-favored-nation treatment as to participation in domestic corporations, but right of corporations participated in by aliens to carry on corporate activities wholly subject to the local laws.
6. Development of mineral resources	Art. IV. Most-favored-nation treatment with respect to exploration and exploitation.	Art. XIII. Most-favored-nation rights accorded for the mining of coal, phosphate, oil, oil-shale, gas, and sodium on the public domain.
7. Protection of persons and property	Art. V (1). Constant protection assured, and rights specified for persons in custody. Protection also to extend to property of corporations. National and most-favored-nation treatment standard applicable in this subject-matter.	Art. I. General rule as to protection almost identical with that in Italian treaty, but there is no reference to rights of persons in custody or specific reference to corporations. No reference to national or most-favored-nation treatment.

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Subject	Treaty with Italy	Treaty with Norway
8. Expropriation	Art. V (2). Right of expropriated person to prompt, just, and effective compensation. Right to withdraw compensation through obtaining foreign exchange. National and most-favored-nation treatment standard applicable in this subject-matter.	Art. I. Rule as to compensation almost identical with that in Italian-treaty, but no reference to withdrawal of compensation. No reference to national or most-favored-nation treatment.
9. Access to courts	Art. V (4). Freedom of access to courts, and right to employ counsel. National and most-favored-nation treatment.	Arts. I, XII. General rule on access to courts comparable to that in Italian treaty. No reference to national or most-favored-nation treatment.
10. Freedom from search	Art. VI. No unlawful entry or molestation. National treatment as to conditions and procedures as to lawful entry and search.	Art. III. Provisions comparable with those in Italian treaty.
11. Acquisition of real property	Art. VII (1). National treatment for American nationals and corporations in Italy. Rights of Italians in US subject to US laws. Italy not required to accord national treatment to citizens and corporations of states that do not accord national treatment to Italians.	No comparable provision.
12. Succession to real property	Art. VII (2). If local law bars alien from succeeding to real property, he shall be allowed at least 3 years to dispose of property.	Art. IV. Provisions similar to those in Italian treaty.
13. Personal property	Art. VII (3, 4). Right of disposition specified, and charges and restrictions to be no less favorable than those applicable in case of nationals. Most-favored-nation treatment as to acquisition and disposition.	Art. IV. Rights as to disposition comparable to those in Italian treaty. No reference to rights to acquire personal property or to most-favored-nation treatment.
14. Industrial property	Art. VIII. National and most-favored-nation rights as to patents, trade-marks, etc.	No comparable provision.
15. Internal taxation	Art. IX. Nondiscriminatory treatment stated in terms related to provisions of existing United States tax legislation. Exception for double-taxation treaties and reciprocity arrangements.	Art. I. National treatment is specified, without exception, except that the national treatment rule is not to apply to taxes related to the exploitation of waterfalls, mines, and forests.

16. Commercial travelers	Art. X. Most-favored-nation treatment with respect to customs and other rights and privileges.	Art. XIV. Provisions similar to those in the Italian treaty.
17. Religious activities	Arts. I (2), II (3), XI (1). Unqualified right to liberty of conscience and freedom of worship, and to hold religious services. National treatment generally for persons, corporations, and associations to carry on religious activities.	Arts. I, V. Provisions similar to those in Italian treaty, but without reference to the rights of corporations and associations.
18. Burial of dead	Art. XI (3). Right to bury dead according to religious customs in suitable and convenient places.	Art. V. Provisions nearly identical with those in Italian treaty.
19. Freedom of information	Art. XI (2). Adherence to principles of freedom of press and free interchange of information. Freedom of transmission of material to be used abroad for publication.	No comparable provision.
20. Civil liability for injury or death	Art. XII (1). National treatment under laws establishing civil liability or granting to person right of action or pecuniary compensation.	Art. II. Provisions similar to those in Italian treaty.
21. Social insurance	Art. XII (2). National treatment with respect to application of certain compulsory insurance laws.	No comparable provision.
22. Military service	Art. XIII. Nationals of one country within other to be exempt from service in armed forces, or contribution in lieu thereof except when 2 countries are engaged in common military action, when either may draft nationals of other, offering them opportunity to serve in own national forces.	Art. VI. In event of war with third state, either country may draft nationals of other who have declared intention to become citizens of that country, unless such nationals depart within 60 days after declaration of war.
23. Import and export duties and restrictions	Art. XIV. Most-favored-nation treatment generally as to treatment of articles, national treatment as to application of laws to persons.	Art. VII. Provisions generally comparable though differing in some details.

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Subject	Treaty with Italy	Treaty with Norway
24. Quantitative restrictions on imports and exports.	Art. XIV (4). Total quantity or value to be imported or exported to be made public. If quota assigned to one country, other party must be given share based upon representative period.	No comparable provision, except to extent that provisions according most-favored-nation treatment could be construed to cover subject-matter.
25. Customs administration	Art. XV. Laws, etc., to be published. Advances in rates imposed by administrative authority not to apply to articles en route at time of ruling. Procedure for appeal from decision of customs authorities to be provided.	No comparable provision.
26. Treatment of imported articles.	Art. XVI (1). National treatment of imported articles with respect to internal taxation, sale, distribution, or use.	Art. VIII. Same treatment to be accorded imported articles as to domestic articles, but provision is less specific than in Italian treaty.
27. Treatment of articles produced in one country by nationals and corporations of other	Art. XVI (2). National treatment to be accorded.	No comparable provision.
28. Export bounties, etc.	Art. XVI (3). National treatment with respect to export bounties, customs drawbacks, and warehousing.	Art. VIII. Provision comparable to that in Italian treaty.
29. Exchange controls	Art. XVII. Nondiscriminatory treatment in application of such controls as they affect products, and nationals and corporations.	No comparable provision, except to extent general provision for most favored-nation treatment could be construed to cover subject-matter.
30. Monopolies and state trading	Art. XVIII (1-2). Fair and equitable treatment as to purchases or sales, and purchases and sales to be influenced solely by commercial considerations.	No comparable provision, except to extent general most-favored-nation provision could be construed to cover subject-matter.
31. Restrictive trade practices	Art. XVIII (3). Harmful effects of such practices recognized, and each party agrees to consult with the other regarding such practices and to take such measures as it deems necessary to eliminate harmful effects.	No comparable provision.

32. Entry of foreign vessels	Art. XIX. Recognition of national status of vessels of other. Most-favored-nation treatment for vessels and cargoes as to entry into ports.	Art. VII. Provision comparable to that in Italian treaty, except that in latter "vessels" is defined to include publicly owned and operated vessels as well as those privately owned and operated.
33. Treatment of foreign vessels	Art. XX. National treatment of vessels and cargoes.	Art. IX. Provisions similar to those in Italian treaty.
34. Imports and exports in foreign vessels.	Art. XXI. No discrimination between national vessels and vessels of other party with respect to articles permitted to be imported or exported, and no discrimination in payment of bounties on goods imported or exported.	Art. VII. Provisions comparable to those in Italian treaty.
35. Loading and unloading of vessels — coasting trade	Art. XXII. Each party to permit vessels of the other to unload portions of cargo at one port and then to proceed to other ports with remainder. No rights accorded as to coasting trade or inland navigation.	Art. XI. Provisions comparable to those in Italian treaty except that in treaty with Norway, most-favored-nation treatment is to be accorded with respect to the coasting trade and inland navigation.
36. Transit	Art. XXIII. Freedom of transit for persons and property.	Art XV. Provisions generally comparable to those in Italian treaty.
37. General exceptions	Art. XXIV. The list of exceptions from the coverage of the treaty as a whole, from the most-favored-nation treatment provisions, or from specific provisions of the treaty, is more extensive than in any similar treaty now in force.	Arts. I, VII. The treaty with Norway does not contain an article dealing solely with exceptions, as does the Italian treaty. In Articles I and VII, however, there are a number of exceptions comparable to some of those in the Italian treaty. The list is much less extensive, however.
38. Waiver of immunities of publicly controlled enterprises	Art. XXIV (6). Immunity from taxation, suit, etc., not to be enjoyed by a publicly owned or controlled enterprise of one party engaged in business in territories of other party.	No comparable provision.
39. Rights of private enterprises in competition with public enterprises	Protocol (2). Rights of an economic nature enjoyed by public enterprises in business in competition with private enterprises shall, with certain exceptions, be extended to such private enterprises.	No comparable provision.

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Subject	Treaty with Italy	Treaty with Norway
40. Territorial scope	Art. XXVI. With certain exceptions, treaty to extend to all territory under sovereignty or authority of either party.	Art. XXIII. With certain exceptions, treaty to extend "to all areas of land, water, and air over which the parties respectively claim and exercise dominion as sovereign thereof".
41. Adjudication of disputes	Art. XXVI. Disputes as to interpretation or application of the treaty to be submitted to International Court of Justice, unless parties agree to settlement by other means.	No comparable provision.
42. Duration and termination of treaty	Art. XXVII. Treaty to remain in force initially for 10 years, terminable thereafter on 1 year's notice.	Art. XXIX. Treaty to remain in force initially for 3 years, terminable thereafter upon 1 year's notice.
43. Protocol	Purpose of the provision of protocol is to clarify and construe certain provisions of treaty.	There is no protocol to this treaty.
44. Additional protocol	Purpose of the additional protocol is to relax certain provisions of treaty as necessary during period of Italy's economic recovery from the war.	There is no protocol of this nature attached to this treaty.

OWNERSHIP OF REAL PROPERTY

Senator Thomas of Utah: Does this treaty make any significant changes in the provisions for the ownership of real property?

Mr. Thorp: This makes no significant changes that I think open up possibility of criticism. Actually it is one of the most favorable treaties that we know of with respect to the treatment of Americans, because nationals and corporations of the United States are to be accorded national treatment in Italy with respect to acquisition and holding of real property. This is an unusually liberal provision, and I think has to be recognized as a real sign of good will on the part of Italy, because there is no corresponding provision with respect to the United States. In our instance, this is a matter of regulation by the States rather than the Federal Government with respect to landholding. Italy does have the right, if it wishes to do so, to refuse to accord this national treatment to citizens and corporations of someone of the United States if that State denies national treatment to the nationals and corporations of Italy.

But in general what has happened here is that Italy, with respect to itself, has provided full national treatment, and we have had to leave it to the States in terms of the kind of reciprocal treatment which we will provide.

Senator Lodge: Does this go into the matter of exploitation of minerals and natural resources?

Mr. Brown: The provision is that we are only obligated to give most-favored-nation treatment.

Senator Lodge: Well now, when you say most-favored-nation treatment with regard to exploitation of minerals, just how does that work? Can you give me an illustration?

Mr. Brown: It would mean that if we gave any rights in the Federal domain to nationals of another country, we would have to be prepared to give the same terms of treatment to an Italian national. We could not say to the Italians, "We won't let you into our national domain at all on any terms, simply because you are an Italian" if we had allowed a Frenchman or an Englishman to come in. But we are not obligated to give them any rights at all.

Senator Lodge: We are not? I can see the justice of that. But in none of these treaties are we putting an alien citizen on the same footing as the American citizen?

Mr. Brown: Not with respect to minerals on the Federal domain.

Senator Lodge: What about with respect to minerals on the State domain?

Mr. Brown: We cannot do anything about that. We are committed to the most-favored-nation treatment only.

Senator Lodge: On State-held lands too?

Mr. Brown: Yes.

Senator Lodge: Thank you.

FREEDOM OF RELIGION

Senator Thomas of Utah: Precisely what are the rights of Americans concerning freedom of religion in Italy?

Mr. Thorp: That appears in a number of articles in the treaty. Article I provides national treatment for natural persons to carry on religious activities. Article II provides national treatment for American corporations and associations to carry on religious activities. Article III provides for national treatment with respect to the carrying on of religious activities by Italian corporations if organized, controlled, and managed by American nationals and corporations.

In Article XI the right if provided, without any qualification or reference to national or most-favored-nation treatment, that nationals be permitted to exercise liberty of conscience and freedom of worship, and conduct religious services. The only limitation is that their teachings or practices not be contrary to public morals or public order.

In the China treaty there is national treatment for natural persons, but the rights for corporations are somewhat different, and the basis is generally most-favored-nation treatment rather than the national treatment which is present in this one.

In Article XII in the China treaty there is a qualified right for Americans to establish schools for the education of their own children. The rights with regard to freedom of worship in the two treaties, however, are substantially the same.

Senator Thomas of Utah: In our peace treaty with Italy there is an article on freedom of religion and freedom for religions, is there not — Article XIII?

Mr. Thorp: That is correct.

Senator Thomas of Utah: What has the status of American religionists been in Italy up to the beginning of the last World War? Have we had any treaty rights there at all?

Mr. Barbour: I will have to look up the record on the treaty rights, but as a matter of practice there has been complete freedom in the exercise of religious freedom.

Senator Thomas of Utah: Throughout all of Italy?

Mr. Barbour: Throughout all of Italy.

Senator Thomas of Utah: Has there been very much religious proselytising carried on in Italy, as there has been in Germany?

Mr. Barbour: I think not.

Senator Thomas of Utah: So that probably it is a provision in the treaty that will not be very much used, is it not?

Mr. Brown: The right to worship and to educate American children and to conduct services, and the schools to be attended by Americans will certainly be used, and is being used, in many parts of Italy. Whether there is likely to be extensive missionary activity I do not know. The right is there. Whether it is likely to be used or not I do not know.

Senator Thomas of Utah: That is new, is it not? Let me know about that in other treaties, will you — whether we had that right in prewar treaties?

Mr. Thorp: There are no provisions in our prewar treaties with Italy relating to freedom of conscience or worship. With respect to religious activities, American citizens were subject to Italian law, there being no treaty provision on that subject.

I might say one other thing, that in the peace treaty there is a provision providing for freedom of worship. The provisions, however, of this treaty would amplify that a good deal. It would be a question as to whether freedom of worship, for example, gave you the right to put up a church building and hold religious property, and there will be a number of things that are collateral to the right to worship which are spelled out as rights in this treaty, although the basic principle was established in the peace treaty.

Senator Thomas of Utah: That would hold also for educational work, would it not? You might have a right to teach school, but you might not have a right to build a school.

Mr. Thorp: Yes; that's right.

Senator Thomas of Utah: Is there anything else in the treaty that deals with the right of Americans to establish and conduct schools in Italy?

Mr. Thorp: That is covered in the first article in the treaty where, in the list of the types of activities where national treatment will control, educational activity is included.

Senator Thomas of Utah: So that if Italians wanted to come here and establish a school, they could, and if we wanted to go there and establish a school we could.

Mr. Thorp: They could within whatever were the general principles that apply to the nationals of our country.

Senator Thomas of Utah: If they meet the requirements of the States, and so on and so forth?

Mr. Thorp: That is right.

BUSINESS PRACTICES

Senator Thomas of Utah: This treaty, Article XVIII, section 3, page 17, seems to make more specific the reference to the International Trade Organization than did the treaty with China. Is there any significance in this?

Mr. Brown: Senator, I am a little bit perplexed by the reference. XVIII (3) is a provision which says that the parties agree that business practices which restrain competition, limit access to markets, or force to monopolistic control might have harmful effects upon the commerce between the two countries, and that if such situations arise, there is provision for consultation and an effort to take corrective measures. That, of course, is directed at the cartel or monopoly situation and is one of the subjects which is dealt with in considerably greater detail in Chapter VI, I believe it is, of the ITO charter. It was thought it would be desirable to have a recognition in this treaty that those activities of private concerns might have very undesirable effects and to provide a mechanism for doing something about it.

The general relationship of this treaty with the ITO charter is the same as that of the China treaty; namely, that the objectives of the two to establish a stable and orderly basis for trade relations, commerce relations, between countries are exactly the same, and that this treaty deals fundamentally with the rights of persons and corporations, and the ITO, if it should come into operation, deals more with the restrictions on the movement of goods. But there is no necessary organic connection between the two of any kind.

RELATIONSHIP TO EUROPEAN RECOVERY PROGRAM

Senator Thomas of Utah: Is there any conflict between this treaty and the bilateral agreement foreshadowed in the Economic Cooperation Act of 1948?

Mr. Thorp: No, sir. Our legal adviser has informed us that there is no such conflict.

Senator Thomas of Utah: Will this treaty help in any way the development of the European recovery program and the work of the Administrator?

Mr. Thorp: I think one should say here that they will be supplementary of each other. This treaty does not provide any direct assistance to the Administrator but it does, we believe, establish a favorable climate or environment for the revival of trade and for the extension of private investment by Americans into Italy, and both of those are part of the objectives which the ECA Administrator is seeking. So that this should be helpful in the achievement of the purposes of his operation.

FISSIONABLE MATERIALS

Senator Thomas of Utah: Article XXIV, section 1, refers to protective measures concerning fissionable materials. The China treaty did not mention this.

Mr. Thorp: That is entirely because of the fact that the China treaty was negotiated before the Atomic Energy Commission was organized and before there was any branch in the Government which had determined on the importance of a provision of this kind. This is a new provision in a treaty. It has not appeared before.

Senator Thomas of Utah: It is put there because we have a law, not because of the chances of these materials being found in Italy; is it not?

Mr. Thorp: This has no relationship to any special concern about the Italian situation or its supplies. I think it is reasonable to say that this would be a provision in any treaty which we negotiate with any country from this time on.

Senator Thomas of Utah: From now on; yes.

MOST-FAVORED-NATION TREATMENT

By way of summary, in what respect does this treaty accord the United States, first, national treatment; second, a conditional most-favored-nation treatment; and third, unconditional most-favored-nation treatment?

Mr. Brown: Sir, that is an extremely difficult question to answer, because of the complexity of the conditions and the way they are interrelated. I think you could sum it up by saying that in the first place there are no provisions for conditional most-favored-nation treatment. There are one or two cases where most-favored-nation treatment is provided for with an exception, such as, well, the exception with respect to treaties for the avoidance of double taxation. But we do not interpret that as being a conditional most-favored-nation treatment provision. It simply says it does not apply in this particular case.

You can enumerate a number of cases where there is definitely unconditional most-favored-nation treatment, such as all of the provisions with respect to customs duties; the access of vessels to ports; the treatment with respect to exchange controls; the treatment with respect to commercial travelers; the handling and disposition of personal property; and the one that we just discussed with Senator Lodge, the rights in exploitation of mineral resources.

In most of the cases, however, in this treaty, the treatment is national treatment or, as in the case of freedom of worship, given on an absolute basis, without any reference to national or most-favored-nation treatment.

I really think that to attempt a specific list of each item would not be too helpful to the committee.

Senator Thomas of Utah: No; it would not.

PLANS FOR OTHER TREATIES

We now have before us treaties with China and Italy. Is there any indication of a well-planned effort to develop such treaties with other countries?

Mr. Thorp: Mr. Senator, we are definitely engaged on a program of that sort. We feel that it is important to revise, to bring up to date, and to establish, where there have not been such, treaties with other countries, and at the present time we have outstanding proposed drafts at various stages of negotiation of treaties with a number of different countries.

Senator Lodge: About how many?

Mr. Thorp: And whenever we have had the opportunity in connection with discussions with them on any particular specific matter, we have raised the question of whether we ought not have such a treaty.

Mr. Brown: There are about a dozen — between 12 and 15.

Senator Lodge: And they are more or less along this same line, of this same general nature?

Mr. Brown: This is the model from which we begin, and then we have to make adjustments, of course, because of the particular situations in particular countries. But the subject-matter and the general treatment are basically what is in the treaties that you have now before you.

But each time we are able to improve one or two articles, and it is a progressive process.

Senator Thomas of Utah: Mr. Thorp, do you want to go on with your statement, then, please?

Mr. Thorp: I think it may be helpful to have pulled together in one place a number of the points that we have discussed this morning, so if you will pardon me, I may duplicate on some of the points, but it is not a very long statement at any rate.

The treaty of friendship, commerce, and navigation with Italy which the committee is now prepared to consider is the second postwar treaty of this type which the Department of State has negotiated; that with China, also before the committee, being the first. The conclusion of these two treaties represents significant progress in a broad program which the Department has undertaken with the objective of expanding and modernizing this country's network of commercial treaties. Although there are now in effect more than a score of these general commercial treaties, many of them may be considered as antiquated, several having been concluded in the first half of the last century. Many of those of more recent date are not well adapted in all respects for meeting present-day needs with regard to economic, cultural, and other intercourse between nations. Between the United States and a number of countries, including Italy, there are no treaties of this type now in effect.

It is a happy circumstance that the first postwar treaty of friendship, commerce, and navigation to be made by the United States with a European nation should have been concluded with the new Italian Republic, and that Republican Italy's first general treaty should be with the United States. Negotiated in an atmosphere of the most cordial friendship and based upon the principle of mutuality, this treaty confirms Italy's adoption of liberal principles of international economic intercourse, and is evidence of the intent of the Italian Government to accord fair and nondiscriminatory treatment to foreign economic enterprise.

Obviously, the provisions of treaties of this type which the United States concludes with all other countries will be basically similar. In the hearings on the treaty with China before this committee on April 26, the Department presented an extensive statement of policy with regard to this type of treaty, a summary of the treaty articles, and explanatory statements on a number of provisions. Much of the information submitted at that time is also applicable in connection with the consideration of the treaty with Italy, and it is thought that it will be unnecessary to burden the record with a repetition of those statements.

There are, however, some important differences between the two treaties to which I should like to refer. The treaty with Italy contains a number of provisions not found in the treaty with China. Among these are clauses relating to freedom of information, Article XI; nondiscrimination in the application of certain compulsory insurance laws, Article XII; a provision for the waiving of the immunities of publicly owned or controlled enterprises carrying on business activities, Article XXIV, paragraph 6; and a provision that rights enjoyed by the publicly owned or controlled enterprises of one party shall be extended by that party, with certain exceptions, to the private business enterprises of the other party.

FREEDOM OF INFORMATION

I believe that this is the first treaty to come before the Senate which contains specific provisions for giving effect internationally to the ideal of freedom of information. The Congress of the United States formally endorsed the principles of freedom of information in a concurrent resolution adopted in 1944 (58 Stat. (pt. 2) 1119), and the United Nations Conference on Freedom of Information at Geneva has recently completed formulation of recommendations for dealing with this subject on a multilateral basis. The provisions in the present treaty set forth a minimum standard of treatment adapted for inclusion in bilateral treaties of this sort, which should provide worth-while protection for United States nationals engaged in informational activities.

The provisions in this treaty relating to the treatment to be accorded foreign corporations and associations are thought to be very advantageous. The standard of national treatment is clearly set forth for the carrying on of commercial, manufacturing, processing, financial, scientific, educational, religious, philanthropic, and professional activities. The rights stipulated for the nationals and corporations of one country to participate in, control, and manage domestic corporations of the other are also extensive, as are the rights for such corporations, participated in by nationals and corporations of the other country, to carry on their corporate activities.

Nationals and corporations of the United States are to be accorded national treatment in Italy with respect to the acquisition and holding of real property. As I have already said, this is a provision of unusual liberality and is a singular evidence of good will on the part of Italy, since national treatment is accorded without prejudicing the right of the States of the United States to freely regulate landholding. The treaty permits Italy, of course, to refuse to accord national treatment to the citizens and corporations of states which deny national treatment to nationals and corporations of Italy.

PROTECTION OF PRIVATE INVESTMENTS

The protection of foreign private investments in the face of the very obvious trend in many parts of the world toward nationalization of industry, extension of public control over certain industries, and the participation of the state in industrial enterprises is a matter that is receiving more and more attention, not only by the Government departments concerned but by businessmen interested in foreign investment. The present treaty with Italy contains provisions designed to increase the protection usually afforded by a treaty of this type. There is, of course, the usual provision for the payment of just and effective compensation for property taken into public ownership or control. Provision is also made, as in the treaty with China, for the transfer of the compensation paid to an expropriated person into the currency of the country of which he is a national. In this treaty there have been included for the first time, as previously mentioned, some rules designed to provide additional protection for private investments. In Article V, it is provided more specifically that in all matters relating to the taking of privately owned property into public ownership or control, the nationals and corporations of one country within the territories of the other shall receive treatment no less favorable than that accorded by such country to its own nationals and corporations or those of any third country. This clause is, of course, designed to prevent the alien from being singled out for unfavorable treatment in case of a nationalization program.

Senator Lodge: Does that mean that the alien is put on the same basis as the citizen, or on the same basis as other aliens?

Mr. Thorp: Both. He gets whichever is better.

Mr. Brown: Sometimes, Senator, the citizen gets treated worse than the foreigner.

Senator Lodge: You are not in favor of that, are you?

Mr. Brown: No.

Mr. Thorp: If they do that for some other country, there is no reason why we should not get it.

Senator Lodge: That is not most-favored-nation treatment, is it?

Mr. Thorp: It is both. It is which ever is better.

Senator Lodge: Give me an illustration of how that would work.

Mr. Thorp: Suppose, let us say, that in a given situation Italy nationalized an industry and they agreed to settle for 50 cents on the dollar so far as Italians were concerned.

Senator Lodge: With the stockholders?

Mr. Thorp: With the stockholders — 50 cents on the dollar with Italian stockholders, but felt that because, we will say, there were some very important citizens of a third country involved in this, and they did not want to get into trouble, they would pay them off at 100 cents on the dollar. In that case we would insist that we be given the full 100 cents on the dollar, because that had been done with a third country.

Oftentimes it works the other way around — that the nationals of a given country will be treated more favorably than the aliens because, shall we say, their political strength may be a little greater with the country, and in this case, if it were more favorable treatment for the nationals, we would get the more favorable treatment.

This is irrelevant in the United States, because in the United States there is no differential treatment at all. If we nationalize property, the owner is entitled to court protection and a determination, if necessary, by going to the courts, of what he will be paid in connection with the expropriation, quite regardless of his nationality.

Senator Lodge: So this is a one-way proposition, is it? It works insofar as Italy is concerned.

Mr. Thorp: It happens that we already have a procedure here which would identify national treatment with the treatment of the alien, and what this does is to bring Italy, shall we say, up to that same standard.

Senator Lodge: In this country, if the Government takes something it condemns it, as I understand it, and pays damages to the private person from whom the thing has been taken. Does that not hold true in Italy?

Mr. Thorp: Yes; this does not change what happens today in Italy. Italy has the same basic principle with respect to nationalization and condemnation that we have. But we have discovered that there is some tendency throughout the world for differential treatment to develop, and it seemed just as well to establish the principle in the treaty, although, as I say, it is not a new principle that is established here. This is confirming by an international agreement an established practice in both countries.

Senator Lodge: Thank you.

Mr. Thorp: In addition to the danger of being expropriated, a serious danger faced by American private enterprise abroad is that of being subjected to unfair competition from state owned or controlled enterprises. In this treaty, an effort is made to deal with this problem by providing that, with certain exceptions, special favors granted by one country to its publicly controlled business enterprises shall be extended also to the private enterprises of the other in situations in which the public enterprises operate in fact in competition with private enterprises. Somewhat related to this provision is another which provides that no publicly owned or controlled enterprises of one country, if it engages in business activities within the territories of the other, shall claim for itself or its property immunity from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned or controlled enterprise is subject therein.

COMPARISON WITH CHINA TREATY

There are a few subjects dealt with in the treaty with China that are not covered in the treaty with Italy. There are no provisions here dealing with the reception of diplomatic representatives, the recognition of agreements and awards in commercial arbitration, the protection of literary and artistic property, and adherence to a program designed to expand international trade. These matters are dealt with in Articles I, VI, IX, and XV, respectively, of the treaty with China. The first and last of these subjects are not considered as of consequence in a treaty with Italy. As to commercial arbitration, as I have already said, the Italian negotiators felt that the provision which we had included in the China treaty was not well adapted for application under Italian law. As to copyright matters, the two Governments concluded that their relations, based upon proclamations issued under their respective laws in 1910, were satisfactory and that no treaty provision would be necessary.

A number of provisions in the treaty with Italy have been restated in language somewhat different from that in the treaty with China. The objective has been to clarify the language or to make the provision more explicit. Examples are the article relating to internal taxation — Article X in the China treaty, IX in the treaty with Italy — and the article relating to exchange controls — Articles XIX and XVII, respectively, in the Chinese and Italian treaties. There are, of course, a number of minor differences in phraseology and even in substance between the two texts that have not been referred to above.

NEED FOR THE PROTOCOLS

In negotiating the treaty with Italy, it was necessary to give special consideration to the grave economic situation facing Italy as a result of the war and the present inability of Italy to supply, unassisted, the minimum needs of its people or the minimum requirements of economic recovery. Accordingly, there has been attached to the treaty a protocol, the purpose of which is to relax under certain conditions some of the rules of the treaty, such as those relating to quantitative restrictions on imports and exports, in order to enable Italy to protect its international-payments position and obtain the essential needs of economic recovery.

The Department of State regards this treaty as a very favorable one from the standpoint of American interests. Prompt ratification would not only have the effect of affording immediate treaty protection for American interests in Italy but would also further strengthen our cordial relations with the Government and people of Italy. The announcement of the signature of the treaty on February 2 was particularly well received by the Italian press and public. Approval of the provisions of this treaty by the Senate will provide the Department with an accepted standard which will afford necessary guidance in proceeding with the negotiation of treaties with other countries.

Senator Thomas of Utah: Thank you, Mr. Thorp.

Is Mr. Egan here? Will you please state your name and your address, and whom you represent?

STATEMENT OF RICHARD M. EGAN, GREAT LAKES CARBON CORP., NEW YORK CITY

Mr. Egan: Richard M. Egan, Great Lakes, Carbon Corp. I am foreign sales manager of Great Lakes Carbon Corp., New York City, 18 East Forty-eighth Street. I have had some experience in Italy, having been there for the greater part of 2 years and having had my family there for about a year and a half.

I thought I would take this opportunity to answer a few questions, mainly, if they were to be put to me, to give you a businessman's version of the peace treaty, just from observation. I am not an expert, and I represent a company that has done a fair amount of business with the Italian Government and the Italian people, and we are still doing business with them, and we have a great interest in the future of Italy.

So far as the peace treaty is concerned, we are of the opinion that it is a good treaty. There are a few things that we feel maybe could be improved, so far as the people's future is concerned; but so far as business opportunities for American business, I am convinced that it is a good treaty.

Senator Thomas of Utah: That is the treaty that brought about peace. Now tell us what you think about this commercial treaty.

Mr. Egan: The commercial treaty is very satisfactory for the American businessman. I see no obstacles. So far as the Italians are concerned, I think their opportunities under that treaty are very satisfactory. We have made a study of it, and we have seen no obstacles.

Senator Thomas of Utah: In other words, you feel that this is a constructive move on the part of our country to enter into this treaty with Italy?

Mr. Egan: Very much so, Senator.

Senator Thomas of Utah: And that American business will benefit from it?

Mr. Egan: Very much so, Senator.

Senator Thomas of Utah: Have you had any trouble trading in the last 2 years?

Mr. Egan: No, Senator. We have done about between five and six million dollars' worth of business with Italy, and all of it has been satisfactory.

Senator Thomas of Utah: Of course, conditions in Italy are such that it is not hard to sell things if they have any money.

Mr. Egan: That is true.

Senator Thomas of Utah: So that probably under any circumstances anybody can get along if they can get the money.

Mr. Egan: Very true.

Senator Thomas of Utah: You think, though, that the Government is moving forward in a really constructive way with this treaty so far as Italy is concerned, and it will contribute to better relations?

Mr. Egan: I think the Government is to be complimented on its move to get a treaty as satisfactory as the one presented.

Senator Thomas of Utah: Have you any criticism at all to make of the treaty?

Mr. Egan: None, Senator.

There is just one small statement that I would like to make — that, in my personal opinion, I feel something should be done about the movement of the population of Italy. They should have opportunities to go to the colonies that they had before the war. I don't say all of them, because that is impossible, but I feel the Italian people must create trade among their own colonials that benefits their own economic situation. I think it is a very serious problem. I do not know whether I should go much further on it. But looking at it from my observations, I think it is something that should be considered.

Senator Thomas of Utah: It is serious from Italy's standpoint?

Mr. Egan: That is right.

Senator Thomas of Utah: This treaty, of course, does not deal with immigration or emigration. It is purely commercial. That is right, is it not?

Mr. Thorp: That is correct, although I think a treaty of this kind nowadays is broader than commercial in the sense that it covers certain human rights that I am sure you would not want to include as under the general commercial heading.

Senator Lodge: It does not have anything to do with immigration?

Mr. Thorp: It does not have anything to do with immigration.

Mr. Brown: There is a specific provision which says it does not.

Senator Thomas of Utah: That is what I understand. It is just as tight as the Chinese treaty so far as the immigration question is concerned.

Mr. Egan: Forgive me for bringing it in.

Senator Thomas of Utah: I think this is a good place to pray that Italy will find an outlet in some other countries than ours. Our quota system has been operating now for a generation, and about the only sentiment I have heard around here is to live up to the quota.

Senator Lodge: I do not know. You hear all kinds of opinions about that.

Senator Thomas of Utah: Do you have any questions?

Senator Lodge: No.

Senator Thomas of Utah: Thank you very much, Mr. Egan, for coming. Mr. Blaisdell. Have you a statement, Mr. Blaisdell?

Mr. Blaisdell: I have a brief statement, Senator, which I am prepared either to present orally or to present for the record, if you wish.

Senator Thomas of Utah: I think we would like to hear it, if we may.

STATEMENT OF THOMAS C. BLAISDELL, JR., ASSISTANT TO THE SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE

Mr. Blaisdell: The treaty before you will form a comprehensive legal basis for carrying out our commercial relations between the United States and Italy. It is intended to replace a previous treaty of friendship, commerce, and navigation concluded with Italy in 1871 following the unification of that country. The 1871 treaty was terminated by mutual agreement on December 15, 1937, and subsequent efforts to work out a more modern and comprehensive treaty prior to the war proved unsuccessful. A temporary commercial agreement of "modus vivendi", was effected in December 1937 by an exchange of notes signed in Rome, but it is no longer recognized as legally operative by the present Italian Government. Italy has voluntarily continued to provide most-favored-nation treatment with regard to customs duties. However, we urgently need an agreement on many other matters if we are to have a satisfactory legal framework for commercial relations between the United States and Italy.

TRADE WITH ITALY

Our trade with Italy is substantial. It decreased considerably during the immediate prewar period because of the depression, and the self-sufficiency policies of the prewar Italian Government. Since the war our exports to Italy, at least, have reached levels, in current dollars, far in excess of those of the 1920s. United States exports to Italy, in 1946, amounted to $327,000,000 as compared with an average of only $185,000,000 in the early 1920s and $58,000,000 in 1938. Imports from Italy in that year amounted to $69,000,000 as compared with $79,000,000 in the early 1920s and $41,000,000 in 1938. In 1947, our exports to Italy had increased further to $479,000,000 while our imports from there decreased to $44,000,000. Although the large United States exports to Italy during 1946 and 1947 have been primarily made up of shipments under the aid programs, there has been a substantial flow of commodities of a type which will probably continue to be shipped from this country to Italy in the years to come, and to be handled more and more through ordinary commercial channels.

The treaty under consideration is the first comprehensive commercial treaty to be concluded by the United States with a European country since 1934 and the first treaty of its type signed by Italy after the war. Its early ratification would help stabilize our postwar commercial relations and be a further step in recognizing the efforts of the Italian Republic to establish itself firmly in what we call a democratic way of life.

The treaty represents acceptance by republican Italy of a number of democratic principles in trade and navigation. The "national" treatment accorded to corporations, for example, is the most liberal ever specified in any treaty entered into by the United States.

The treaty is based in general upon the principle of mutuality, and establishes standards to govern the relations between the two countries in many fields of activity. It includes articles relating to the status and activities of persons and corporations, protection of persons and property, landholding, freedom of information, treatment of vessels, and commercial principles such as those in the proposed charter for the International Trade Organization, as well as provisions concerning such matters as exchange control, transit, and industrial properties.

The treaty is not a trade agreement and contains no specific obligations as to import or export treatment of any individual commodities. It does recognize modern developments in import and export regulations and exchange controls, and seeks so to condition their application as to provide, in accordance with basic American policy, the utmost possible freedom for the pursuit through ordinary private channels, and on a nondiscriminatory basis, of commercial and cultural relations.

In this connection, special attention should be drawn to the second protocol, which relates to the acceptance of certain quota and exchange restrictions necessary to meet the special commodity and foreign exchange shortages of the present reconstruction period, but even these exceptions are carefully circumscribed so as to protect the legitimate interests of Americans transacting business with or in Italy.

In drafting this new treaty with Italy, numerous additions and changes were made to and from the original 1871 treaty which the two Governments had agreed in 1936 was "antiquated and inadequate to meet modern conditions". Conditions have undergone further considerable change since that date.

NEW CONDITIONS

Treaties of friendship, commerce, and navigation have traditionally included, as the committee well knows, provisions relating to entry and residence of individuals, the protection of persons and property, the tenure and disposition of real and personal property, religious activities, customs administration, transit rights, and the treatment of shipping. Provisions of this character have been included in the new treaty. In addition, numerous recent economic developments of which we must take account in our commercial relations have made it necessary to expand our traditional form of treaty. These include such things as the development of the corporation in all of its modern ramifications, the development of workmen's compensation and other social insurance laws, and the spread of certain philanthropic, educational, and cultural activities. Since the war we have been additionally confronted with major changes in the use of import and export quotas and licenses, exchange controls, and state trading with which we must deal. The new treaty takes account of all of these developments, taking care, as I have already pointed out, to minimize the impact of any restrictive practices upon the future development of free, private, international commerce.

Let me outline, briefly, a few of the major provisions of the treaty in which I think you will be interested.

With regard to customs duties and charges on imports and exports and the formalities of customs clearance, most-favored-nation treatment is mutually granted. With regard to the taxation, internal sale, and distribution or use of imported goods, national treatment is mutually granted. This means that while Italy may lay down regulations for the most effective distribution and use within its borders of imported commodities it will not discriminate against imports from the United States in favor of those from any other country.

Another set of provisions relates to the setting of import and export prohibitions or quotas. Again, most-favored-nation or nondiscriminatory treatment is stipulated. When quantitative restrictions are imposed through quotas, licenses, or other measures, the treaty requires that, as a general rule, public notice be given of the total quality or value permitted to be imported, exported, sold, distributed, or used, during a specified period. In line with this last provision, the Office of International Trade is already publishing, wherever practicable, country quotas for United States commodities in scarce supply which are under export control. This, Senator Thomas, is the provision of our office in the Department of Commerce in our trade with Italy and other countries.

It is further specified in the treaty that if either party allots to any third country a share in the total quantity or value of any article in which the other signatory has an important interest, it shall, as a general rule, allot to this other signatory a share based upon the proportion of the total supplied to it by, or exported by it to, the other during a representative period. This provision was originally incorporated in the temporary 1937 agreement, and was designed to deal with the discriminatory channeling of imports and exports practiced by Italy and Germany before the war. To meet the present-day needs of Italy, which is suffering from critical shortages of dollars, the second protocol permits in the application of this provision a temporary latitude. Under this protocol the paragraphs of the treaty providing for most-favored-nation treatment will not apply to quantitative restrictions which place temporary limits on the freedom of exchange operations in a scarce currency, or to temporary exchange restrictions required in the postwar transitional period on payments and transfers for current international transactions. The parties are also given leave to apply such quantitative restrictions as are necessary to secure, during the early postwar transitional period, the equitable distribution of goods in short supply, or to use accumulated inconvertible currencies for the purchase of imports. In the latter case, advantage can be taken of the protocol only if it is in fact necessary to restrict imports to protect monetary reserves or to yield a volume of imports otherwise impossible. All exchange restrictions, moreover, must be in accord with applicable provisions of the International Monetary Fund agreement.

Other provisions are designed to protect the competitive position of American enterprises in their dealings with state trading companies, to assure fair and equitable treatment in the award of concessions and other contracts, and to encourage the future conduct of business within both countries along competitive nonmonopolistic lines. There are further provisions, relating to many facets of commercial operation and the ownership, transfer, and use of property which specify treatment according to the most-favored-nation and/or national principles.

I do not propose to burden the committee by discussing all of these various provisions. Mr. Thorp has covered that. However, if I can add to what I have already said, I will be glad to answer questions concerning these.

INTERNATIONAL TRADE PRACTICES

Senator Thomas of Utah: A general question, first of all: You are dealing all the time with these problems and have been through the International Trade Conference and the rest of it. Do you think there is any hope of overcoming in international trade the practices which were developed by those nations before the war, channeling trade entirely to their own advantage?

Mr. Blaisdell: Senator, if I did not believe that that were possible, I would not be doing what I am doing now. I am convinced that this is the objective that we should be driving toward all along. That might sound strange to some of my exporter friends who are on my shoulders most of the time because of the export controls which we administer in the Department of Commerce, but I assure you that it is a very sincere conviction that the kinds of regulations which we are now using to a limited extent in the United States, to a greater extent in practically all European countries and in many other countries of the world, are a function of this particular period in our economic development, when the world is seriously disrupted from the conditions that developed during the war. The development of inflationary monetary policies, which is worldwide — and we are not excluded from that — has created conditions of demand in international trade which are entirely unusual. They are of an entirely different character than the directive and inhibitory practices which were used, and for which the same instruments were used, prewar. They arise from different conditions. And the United States has taken the initiative in a great many cases and has thrown all the support of its people and its Government against the development of these practices wherever it is possible. It has played a major part in the development of the International Monetary Fund and the International Bank and the International Trade Organization because we have believed that through these devices we would eventually be able to get to a point where the restrictions that are now burdening trade can be gotten rid of and private trade can proceed with as little interference as possible.

Senator Thomas of Utah: Is there any place in the world where there is any free money today?

Mr. Blaisdell: I do not know of any place. I do not know of any country. Even the United States has limitations on the use of gold.

Senator Thomas of Utah: Yes. We have quite a bit of it hidden away, I think. We are told we have. I hope it is still there.

We have not in the world today anything equivalent to the old Austrian dollar, and then the old Mexican dollar, which had a way of keeping value and going places and doing things, especially when our Government was set up, have we? There is nothing like that anywhere, is there?

Mr. Blaisdell: I know of none. I think the last remnant of that, Senator, was the Chinese silver unit, which was never coined.

MONETARY PROBLEMS

Senator Thomas of Utah: I do not mean free trade in the political sense, but can you have free trade in the world without free money?

Mr. Blaisdell: I do not think so.

Senator Thomas of Utah: Neither do I, and I am wondering if we are starting at the wrong end in these trade arrangements. Is there anyone thinking about money in the world today? Did not the Germans teach us a lesson about control in such a way that we have not yet gotten over it?

Mr. Blaisdell: I think there is a growing recognition of the significance of monetary and financial factors in this whole problem of trade relationships.

Senator Thomas of Utah: They are beginning to see it?

Mr. Blaisdell: I think so. In fact, I think in connection with this treaty it would not be out of the way to point out that the very existence of the protocols, besides the treaty itself, is a recognition of something very fundamentally wrong in the monetary relationships that exist; that without the development of stabilized currencies within the countries these restrictions are almost inherent, and a necessity for working out within the financial area of an international way of doing things. This was recognized in the fund agreement, and we are living through that period of finding the practical ways of working to an international monetary system which certainly today is different from anything we have ever known before.

Senator Thomas of Utah: There is in the Congressional Record of either Monday or Tuesday a radio talk on money and how to finance this European recovery and contribute to the bringing about of money stability in the world by creating something that someone can hang to. Could I go so far as to suggest that you read that and see whether we have an element of something?

Mr. Blaisdell: I will be very happy to read it, Senator.

Senator Thomas of Utah: There are two pieces, one on Jefferson. It is not that piece. It is the other one.

COMPULSORY MILITARY SERVICE

Article XIII deals with military service of the Italian and American nationals. I think this is similar to the China treaty provision, but since it sets a pattern for Europe, it might be well to ask about it, and I would like to ask whether we are not running again into a conflict with our National Selective Service Act as it existed.

Mr. Brown: Senator, I do not think there is any conflict. The provision is the same as the provision in the China treaty, namely, that nationals of the other country are exempt.

I think I see what you are driving at — that if you had a situation such as we have here now, where there is no common conflict, and we should impose or have a draft, the provision of the treaty which exempted an Italian national who is recently in this country from the draft might be in conflict with our Selective Service Act.

Senator Thomas of Utah: I am afraid that if the law were reenacted today as we enacted it in 1940, and then this treaty became the supreme law of the land, it would actually, because of most-favored-nation treatment and the rest, modify our Selective Service Act, because we extended registration — and the implication of registration was the call of the draft — to everybody. We paid no attention to citizen or noncitizen. And I think that it would be well before we consider either of these two treaties in the Senate for us to be primed on this situation, and I think it would be well for you to talk to the armed services representatives.

Mr. Brown: This provision has been checked with Selective Service and with the National Military Establishment, and it was based on the draft provisions which were in effect during the war, in 1940.

Senator Thomas of Utah: But you still have not answered that question about what becomes the law of the land when you allow a treaty to modify it. In practice we were all right, because there were not very many involuntary hardship cases, especially of Europeans. There were so far as the Japanese were concerned, and there were so far as the Chinese were concerned, and there is a provision which made it possible for the Army to judge of its own members, and therefore it avoided some of these questions. But we would not enlist foreigners for guard duty in Europe who were actually drafted if they happened to be in the United States.

Mr. Brown: I will have to give you a memorandum on that, but I know we have checked that carefully with both Selective Service and with the military.

Senator Thomas of Utah: I am more interested in the theory than in the practice. In practice I do not think you have any problem at all, and you would not have a problem unless we had general mobilization here, because there are plenty of outs and plenty of ways of making different arrangements. But as you pyramid laws within the United States, I would hate to have to tell the Senate that this law will modify the theory of the national draft if it becomes the supreme law of the land.

Mr. Brown: You have particularly in mind a situation where in peacetime there is no common effort between the two countries, if you had a draft and you might want to include a national of another country resident in this country?

Senator Thomas of Utah: That is right. It is important for a number of reasons. If we ever got to the place where manpower was a problem, as it seemed to be a problem just before the end of the last war, and we were discussing mobilization of manpower, then it would be important even in fields that are nonmilitary. We went so far, you see, as to almost draft nurses.

Mr. Thorp: Senator, I want to suggest at this point that this has to be looked at from the other direction, too. In other words, on the mutual basis we might get into a situation where an American living in Italy might be drafted by the Italian Government to serve in the Italian Army, and I am not quite sure where one comes out if you start this.

Senator Thomas of Utah: And that is the power of the treaty in the United States, and we will live up to the mutual aspect of it, and if you give to Italy powers that we do not want to give to Italy, we of course have done something we do not want to do.

I cannot help but feel that that article is one that we ought to seriously go into before we bring the treaties to the Senate. That is my feeling.

Mr. Thorp: We will be very glad to give you a full memorandum about it.

(The matter referred to is as follows:)

LEGAL BACKGROUND OF THE MILITARY SERVICE ARTICLE IN THE COMMERCIAL TREATIES WITH CHINA AND ITALY

Pre-World War I treaties

A number of United States treaties concluded prior to World War I contained broad provisions for exemption from military service without any qualification as to (1) whether or not the nationals of one contracting party claiming exemption under the treaty within the other contracting party had declared their intention to become citizens of such other contracting party or (2) whether or not the two contracting parties were both at war with the same third country. For example, the first paragraph of Article II of the treaty of November 25, 1850, with Switzerland provides on this point:

> "The citizens of one of the two countries, residing or established in the other, shall be free from personal military service, but they shall be liable to the pecuniary or material contributions, which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service."

World War I draft

The Selective Service Act of 1917, enacted soon after this country became a belligerent in World War I, made liable for military service "male citizens, or male persons not alien enemies who have declared their intention to become citizens" (sec. 2, 40 Stat. 77 and 78).

Thus all aliens who had not declared their intention to become citizens, that is, nondeclarants, were exempt. This legislation was amended in 1918 by the addition of the following proviso:

> "*Provided*, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States" (40 Stat. 885).

Under this amendment neutral declarants also were exempt from military service provided they gave up the privilege of becoming citizens.

Following World War I a number of commercial treaties were concluded containing military-service provisions generally comparable to the following in the 1928 treaty with Norway:

> "Article VI
>
> In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war."

World War II draft

The Selective Service Act of 1940, enacted before the United States became a belligerent in World War II, made liable for training and service "every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen" (sec. 3, 54 Stat. 885).

This was comparable to the 1917 law before its amendment.

A few days after the United States became a belligerent in World War II this 1940 act was amended so as to make subject to training and service "every male citizen of the United States, and every other male person residing in the United States . . ., *Provided* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States" (55 Stat. 845).

Thus the basis for exemption was changed, and throughout the war it remained whether the alien was a national of a neutral rather than a cobelligerent country.

In fact, the final wartime draft legislation during both World War I and World War II permitted the complete exemption of neutral aliens, provided they gave up the privilege of becoming citizens of the United States (in the case of neutral declarants only in World War I legislation; in the case of all neutrals in the World War II legislation).

Chinese and Italian treaties

This background of wartime legislation was considered as indicative of the policy of this Government as to the liability of aliens to military service, and for this reason was written into both the Chinese (Art. XIV) and the Italian (Art. XIII) treaties. These both contain a general statement as to exemption, followed by a qualification that this exemption shall not apply in cases of cobelligerency. The Chinese treaty adds a specific reference to possible loss of the privilege subsequently to acquire the citizenship of the contracting party from which the exemption is claimed. This latter clause was omitted from specific mention in the Italian treaty on the clearly expressed understanding that it was superfluous since nothing in the treaty would prevent the denial by the United States of this privilege to Italians claiming exemption from military service.

The provisions of the two treaties as to the right of nationals of a cobelligerent contracting party to elect to serve with the forces of the contracting party of which they are nationals is in accord with the practice of this country in both World War I and World War II.

These provisions have been drafted in collaboration with the appropriate officials of the War and Navy Departments and the Office of Selective Service Records.

POLICY CONSIDERATIONS RELATING TO THE MILITARY SERVICE ARTICLE IN THE TREATIES WITH CHINA AND ITALY

Among the purposes of treaties of friendship, commerce and navigation, such as those under discussion, are *(a)* the establishment of a formal basis on which American citizens may freely move about the world in pursuit of their lawful affairs without fear of detention or abuse of their persons, and *(b)* the building of a legal environment in which interchange of personal skills and knowledge as well as goods, services, and capital, can thrive. Some guaranty against impressment by the foreign military is thus one of the elements of the foundation on which this Government's commercial foreign policy is built. The treaty rule against the conscription of aliens is, therefore, directed toward the same objectives as the rules for the protection of persons and property, for the payment of compensation for property taken for public use, and for the humane treatment of persons taken into custody by the police authorities.

It is held by many authorities that it is contrary to international law for a government to compel aliens to serve in its military forces. It is thought that it would not be good policy for the United States to appear to repudiate a tenet of international law to which it has adhered in its treaty policy for many decades past. Under the municipal law of Italy and many other countries, aliens are not subject to compulsory military service. A decision by the United States to adopt a contrary policy would establish a precedent which other governments could be expected to follow.

It is important to regard this problem from the viewpoint of Americans abroad. Forced service in certain armies of the world would be tantamount to cruel and unusual punishment for American citizens. The obligation of military service is especially closely associated with the idea of national loyalty. The American who goes abroad in the interest of American foreign trade, of world economic development, of international cultural cooperation should not be obliged by any policy of this Government to abandon his primary loyalty to the United States. If foreign governments follow the practice of requiring an oath of allegiance from conscripts (as in the United States, under pain of severe penalties), a policy of allowing Americans to be conscripted abroad would be a policy of sanctioning the involuntary expatriation of American citizens. It is not believed that the United States should, through a policy of impressment, in effect force citizens of any country to divest themselves of their nationality.

Senator Thomas of Utah: You remember that in the First World War every Japanese in the United States answered our registration questions the same. There was in the United States Supreme Court at that time the case of Osawa, I think it was, a case on nationality, citizenship, and the rest of it. And when we registered the Japanese, the Japanese answered in such a way as to stand for their right, as their attorneys were arguing their case, before the Supreme Court. Nothing came of it excepting that. But at the same time, if there had been a situation of this kind, it might have done some damage to some Americans in any country where they have compulsory universal training at all times.

Mr. Brown: I think we were thinking primarily of the point that Mr. Thorp raised, that we did not want to be in a position where any American citizen would have been compelled to serve military training in Italy.

Senator Thomas of Utah: And I do not want to be in that position either. If, for instance, our practice becomes universal military service, I surely do not want to have a treaty that if we happen to go somewhere else military service in some other countries would be ours.

Mr. Brown: This treaty would protect us against that.

Senator Thomas of Utah: I do not know whether it will or not.

Mr. Brown: It specifically says —

Senator Thomas of Utah: It says that: I know. I am just frightened that it brings complications into the even tenor of our ways, where we have never had any problems until that one came up.

Is there anything else?

Dr. Wilcox: That is all.

Senator Thomas of Utah: Thank you all for coming. We will bring the hearings to an end.

(Whereupon the subcommittee hearings were closed.)

Document 16

COMMERCIAL TREATIES, HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, EIGHTY-SECOND CONGRESS, SECOND SESSION, TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND COLOMBIA, ISRAEL, ETHIOPIA, ITALY, DENMARK AND GREECE, 9 MAY 1952

[See I, *Memorial of the United States, Annex 86]*

Document 17

HEARING BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, EIGHTY-THIRD CONGRESS, FIRST SESSION, EXECUTIVES R (82D CONG. 2D SESS.), F (82D CONG. 2D SESS.), H (82D CONG. 2D SESS.), I (82D CONG. 1ST SESS.), J (82D CONG. 2D SESS.), C (83D CONG. 1ST SESS.), N (83D CONG. 1ST SESS.), O (83D CONG. 1ST SESS.), TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION WITH ISRAEL, ETHIOPIA, ITALY, DENMARK, GREECE, FINLAND, GERMANY AND JAPAN RESPECTIVELY

[Not reproduced]

Document 18

ARTICLE 2362 OF THE ITALIAN CIVIL CODE

[Italian text not reproduced]

2362. *Sole Shareholder.* For obligations of the company which arose during the period in which the shares are shown to have belonged to one person only, such person is liable without limitation in the case of insolvency of the company.

Document 19

ARTICLE 2446 OF THE ITALIAN CIVIL CODE

[Italian text not reproduced]

2446. *Reduction of Capital Pursuant to Losses.* When it appears that the company's capital has diminished by more than one-third as a result of losses, the directors shall call the meeting without delay to take appropriate action. A report on the financial condition of the company, together with the remarks of the board of auditors, shall be submitted to the meeting. A copy of the report of the directors together with the remarks of the board of auditors shall remain on file at the company's legal address for eight days preceding the meeting, in order that the members can examine it.

If the loss does not prove to have been reduced to less than one-third within the following fiscal year, the meeting that approves the balance sheet of such period shall reduce the capital in proportion to the losses that have been ascertained. Failing this, the directors and auditors shall petition the tribunal to provide for a reduction of capital to the extent of the losses shown in the balance sheet. The tribunal shall, after hearing the public prosecutor, issue a decree which the directors shall, under their responsibility, cause to be registered in the register of enterprises. An appeal against such decree can be taken to the court of appeals within 30 days from the registration.

Document 20

ARTICLE 5 OF THE UNIFIED TEXT N. 383, 3 MARCH 1934, OF THE MUNICIPAL AND PROVINCIAL LAW MODIFIED BY THE LAW 27 JUNE 1942, NO. 851 AND BY THE LAW 9 JUNE 1947, NO. 530

[Italian text not reproduced]

CONSOLIDATED TEXT NO. 383 OF 3 MARCH 1934, OF THE MUNICIPAL AND PROVINCIAL LAW, AMENDED BY LAW NO. 851 OF 27 JUNE 1942, AND BY LAW NO. 530 OF 9 JUNE 1947

5. Unless otherwise provided for by the law, the appeal to higher authorities is admitted against the provisions issued by inferior government authorities.

The appeal to a higher authority can only be filed by the person concerned, and is no longer admitted after 30 days have elapsed from the date of the service or of the administrative notices or since the person concerned has been fully notified of the provision.

The authority with which the appeal is filed, if it does not deem necessary to notify the appellees through the official channels, orders the appeal to be notified to the said appellees by the appellant, within the terms laid down by the authority itself and suspends the decision, until it is informed that the notice has been served.

The persons concerned may submit their deductions to the authority with which the appeal is filed, within 20 days from the service of the said appeal.

After 120 days from the date of the filing of the appeal without the authority with which the appeal has been filed having ruled on the said appeal, the appellant may request the authority, after notifying it by means of a petition, that the appeal be ruled upon.

After 60 days from the service of such petition, without any decision having been issued, the appeal is considered dismissed to all intents and purposes.

The appeals filed with the Government, irrespective of the law envisaging them, are ruled upon with the Minister's final decree, unless they are appeals against ministerial provisions, or otherwise provided for by the law.

Document 21

ARTICLES 6-160-216-217 OF THE ITALIAN BANKRUPTCY LAW, ROYAL DECREE OF 16 MARCH 1942, NO. 267

[Italian text not reproduced]

ARTICLE 6 OF THE ITALIAN BANKRUPTCY LAW

6. *(Initiating the Bankruptcy Declaration).* Bankruptcy shall be declared on request of the debtor, on petition of one or more creditors, on petition of the office of the public prosecutor or on the initiative of the bankruptcy court itself.

ARTICLE 160 OF THE ITALIAN BANKRUPTCY LAW

160. *(Conditions for authorization).* The entrepreneur who is insolvent, may, until the declaration of bankruptcy, propose a preventive arrangement to creditors, if the entrepreneur:

(1) is registered in the registry of enterprises for at least two years, or at least since the beginning of the enterprise if this has had a shorter duration and the enterprise has kept appropriate accounting records for the period;

(2) in the five preceding years was not declared bankrupt or granted a preventive arrangement;

(3) was not convicted of fraudulent bankruptcy, or for crimes against property, public faith, public economy, industry or commerce.

The proposal for an arrangement shall meet one of the following conditions:

(1) that the debtor shall offer substantial property or personal guarantees to pay at least 40 per cent of the amount owed to general creditors within six months of the date of the authorization of the arrangement; or in the event that a greater extension of time is proposed that the debtor shall offer the same guarantees for payment of legal interest on the sums owing beyond six months;

(2) that the debtor shall offer to the creditors for the payment of the debts an assignment of all assets existing in the debtor's estate at the date of the arrangement proposal, except those listed in Article 46, so long as the valuation of these assets guarantees that the creditors will be satisfied at least to the extent indicated in No. 1 above.

ARTICLE 216 OF THE ITALIAN BANKRUPTCY LAW

216. (*Fraudulent bankruptcy*). An entrepreneur who is declared bankrupt shall be punished with imprisonment of three to ten years if the entrepreneur:

(1) has diverted, hidden, disguised, destroyed or dissipated in whole or in part assets in order to prejudice the creditors or has listed or recognized non-existent liabilities;

(2) has removed, destroyed or falsified in whole or in part, with the intent of procuring for his or herself or others an unjust profit or to prejudice the creditors, the books and other accounting records or has maintained them in a manner which makes it impossible to ascertain the assets of the enterprise or the conduct of the business.

The same punishment shall be applicable to an entrepreneur declared bankrupt who during the bankruptcy proceeding commits any of the acts set forth in item 1 of the preceding paragraph or else removes, destroys or falsifies the books or other accounting records.

The bankrupt debtor who, prior to or during the bankruptcy proceeding for the purpose of favouring a particular creditor to the prejudice of the other creditors, makes payments or simulates preferences in favour of such a creditor shall be punished with imprisonment of one to five years.

In addition to other applicable punishment including the provisions of Chapter III, Title II, Book 1, of the Penal Code, conviction on one of the acts listed in the present article shall deprive the person for a period of ten years of the right to operate a commercial enterprise or to have a management position in any enterprise for a period of ten years.

ARTICLE 217 OF THE ITALIAN BANKRUPTCY LAW

[For another English translation see Memorial of the United States, Annex 41]

217. (*Culpable bankruptcy*). In cases not included in those listed in the prior article, the entrepreneur declared bankrupt, shall be sentenced to six months to two years of imprisonment, if the entrepreneur:

(1) has incurred excessive personal or family expenses considering the entrepreneur's economic status;

(2) has consumed a significant part of the assets in hazardous or manifestly improvident operations;

(3) has engaged in seriously imprudent operations to retard the bankruptcy;

(4) has aggravated the economic situation by abstaining from petitioning for the declaration in bankruptcy or by other serious negligence;

(5) has failed to satisfy obligations assumed in a preceding preventive arrangement of bankruptcy.

The same punishment shall be applicable to the bankrupt who, during the three years preceding the declaration of bankruptcy, or else since the beginning of the enterprise if it has been in existence for less than three years, has not kept books or other accounting records required by the law or has kept them in an irregular or incomplete manner.

In addition to other applicable penal sections including those in Chapter III, Title II, Book I, of the Penal Code the convictions shall bar the bankrupt from operating a commercial enterprise and from serving in a management position of any enterprise for a period of up to two years.

Document 22

ARTICLES 1, 2 AND 3 OF THE LAW 22 DECEMBER 1956, NO. 1589, "INSTITUTION OF THE MINISTRY OF STATE PARTICIPATIONS IN INDUSTRY"

[Italian text not reproduced]

LAW NO. 1589 OF 22 DECEMBER 1956 (PUBLISHED IN THE *OFFICIAL JOURNAL* OF 6 FEBRUARY NO. 33)

INSTITUTION OF THE MINISTRY OF STATE PARTICIPATIONS IN INDUSTRY

Article 1. The Ministry of State Participations in Industry is hereby instituted.

Article 2. All tasks and prerogatives which, in compliance with existing provisions, fall within the competence of the Ministry of Finance, are hereby devolved upon the Ministry of State Participations in Industry as far as participations so far managed by the former Ministry, and State-owned enterprises are concerned.

All tasks and prerogatives which, in compliance with existing provisions, fall within the competence of the Council of Ministers, the Presidency of the Council of Ministers the Ministers' Committees or the individual Ministries in connection with IRI (translator's note: Institute for Industrial Reconstruction), ENI (translator's note: National Agency for Hydrocarbons), and of all the other enterprises directly or indirectly state-controlled, are devolved upon the afore-mentioned Ministry. Such enterprises shall be indicated in the decrees issued by the President of the Council of Ministers, in agreement with the Minister for State Participations in Industry and the Minister involved.

The decrees shall be published in the *Official Journal* of the Republic of Italy.

All State-owned enterprises and participation shares referred to in the previous subparagraph are transferred to the Ministry for State Participations in Industry.

The tasks and prerogatives falling within the competence of the Ministries of the Treasury, Industry and Trade, in connection with the Fund for the financing of mechanical industry (FIM), are also devolved upon the new Ministry.

Article 3. The participations referred to in the foregoing article shall be inserted in the framework of independent management bodies, operating according to cutting-down-on-expenses criteria.

The first enforcement of participations shall have to be carried out within one year after the coming into force of the present law.

Document 23

Decision No. 3086 of the Court of Cassation, Dated 23 October 1974, *Foro Italiano* (1976), I, 1166

[Italian text not reproduced]

SUPREME COURT OF CASSATION; LABOUR SECTION; DECISION NO. 3086 OF 23 OCTOBER 1974; PRESIDENT CAPORASO, DRAFTED BY RENDA, PUBLIC PROSECUTOR SILOCCHI (CONCL. CONF.); MEUCCI AND OTHERS (AVV. PACCHI) V. SOC. MANIFATTURA LANE MARZOTTO (AVV. C. FORNARIO, ARANGUREN) AND COMMUNE OF PISA; COMMUNE OF PISA (AVV. LORENZONI, VERRUCOLI; CAPACCIOLI) V. MEUCCI AND OTHERS AND SPA. MANIFATTURA LANE MARZOTTO. APPEAL CONFIRMED FLORENCE 6 NOVEMBER 1971.

LABOUR (RELATIONSHIP) — REQUISITION OF PLANT — RIGHT TO REMUNERATION — LACK OF GROUNDS (CIVIL CODE, ARTS. 835, 836; LAW NO. 2248 OF 20 MARCH 1865, APPENDIX E, ON ADMINISTRATIVE LITIGATION, ART. 7; ROYAL DECREE NO. 1825 OF 13 NOVEMBER 1924, REGULATION OF PRIVATE EMPLOYMENT, ART. 6).

Any employer whose company has been requisitioned by the State authorities has no obligation to pay the remuneration owing to the employees for the period for which the requisition is in effect.

The Court, etc. Proceeding. On 17 June 1969 Roberto Meucci *(et coeteri)* summoned S.p.A. Manifattura Lane Gaetano Marzotto and Sons, whose main place of business is in Valdagno, to appear before the Court of Pisa, declaring as follows: to have all been employed by the aforesaid company in the Pisa plant, which had suspended its activities on 10 June 1968; to have received their salaries until the end of June, but to have received no further remuneration between 1 July 1968 and 25 January 1969; that the company had justified its failure to pay the salaries on the ground that the requisition of the plant by the Mayor of Pisa starting from 25 June 1968 had prevented it from carrying on all its activities.

In view of the aforegoing, the plaintiffs, on the grounds that this justification was unfounded, both because the requisition of the plant was dependent upon the resumption of activity, so that the company could have had access to the plant if it had so desired, and because the order was issued by the Mayor after the decision to suspend activity had been implemented, claimed that, since they had remained at the company's disposal, the latter should be sentenced to pay the sums due to them by way of salary and other payments for the period running from 1 July 1968 to 25 January 1969, that is, the date of the lifting of the requisition order after which salaries were paid regularly.

During its appearance in court the company objected that, because of a serious crisis in the textile industry, it had been forced to suspend all activity early in June 1968 in anticipation of a possible, more rational restructuring of the company, although continuing to pay its employees' salaries. However, on 25 June 1968, the Mayor of Pisa had ordered the plant to be requisitioned and had taken possession of it despite the reservations immediately expressed by the company. By so doing he created a situation in which the company could conceivably be deprived of the services of its own employees, thereby paralyzing all initiatives and substituting the owners of the company. The company claimed that the plaintiffs were therefore entitled to claim payment of the salaries for the entire period of the requisition solely from the Commune.

In connection with the above claims, the company, after receiving authorization, had the Commune summoned, claiming that the latter should be sentenced to pay the sums claimed by the plaintiffs.

On its appearance the Commune claimed that the requisition had not given rise to any working activities and that it was therefore extraneous to the labour relations of the Marzotto Company, which still existed, as the company had not dismissed or transferred its employees.

In its decision of 14 May-5 June 1970 (Foro it., 1970, I, 2596), the court upheld the plaintiffs' claim and sentenced the company to pay the sum claimed by the plaintiffs. On the other hand, it dismissed the claims proposed by the company against the Commune.

The company appealed against the above decision, and was opposed by the other parties. In upholding the appeal, the Court of Appeal of Florence, in its decision of 6 November 1971 (Foro it., Rep. 1972, under the heading Lavoro (rapporto), No. 553), modified the decision appealed against, pointing out that: quite apart from its legitimacy, the requisition order had had an effect on the existing juridical relationships, not to the extent of resolving them, in so far as it was only a requisition regarding use, but by suspending them, thereby interrupting the mutual obligations; the latter would thus come back into force at the cessation of the requisition, which should be considered as *factum principis* which, by preventing the company from demanding any labour services from its employees, had, at the same time, suspended the obligation to pay any salaries until the date on which the requisition was suspended; for which reason it is to be excluded that suspension during the period of requisition was due to a "fact depending upon the owner" as declared by the lower court judges, who based their decision on Article 6 of the Royal Decree No. 1825 of 13 November 1924. The Court of Appeal found that the petition by the company that the Commune should be liable for the payment of the salaries during the period of the requisition could not be granted owing to the lack of active legitimation of the company to propose such a petition.

All the original plaintiffs, with the exception of Roberto Roberti, proposed making an appeal to the Court of Cassation, which was opposed by the Marzotto Company with a counter-appeal. In notifying its counter-appeal, the Commune of Pisa proposed an incidental appeal. Both the Commune and the Marzotto Company presented illustrative memoranda.

Grounds for the decision. The main and incidental appeals are to be combined since they appeal against the same decision.

The petitioners claim, in their first and second points, which can be examined together since they are closely related, that there has been a breach of Articles 4 and 36 of the Constitution with regard to Article 2099 of the Civil Code and Article 6 of Royal Decree Law No. 1825 of 13 November 1924. They maintain that the Court of Appeal should not have denied their right to payment of salaries during the period of the requisition in so far as they were at the disposal of the employers and that there was no interruption in the working relationship, since no such suspension is provided for in the legislation governing requisitions and, in this particular case, there was no mutual desire of the parties to obtain suspension of the relationship. In conclusion, they claim that, in view of Article 6 of the RDL No. 1825 of 13 November 1825, and the fact that the suspension of work occurred "as a result of facts depending upon the owner", the Court of Appeal should not have denied them the right to remuneration during the aforesaid period.

As summed up above, the two grounds are inadmissible. It is a known fact that labour contracts are synallagmatic contracts involving the performance of reciprocal services under which employees are entitled to receive remuneration in so far as they fulfil their work, except in the cases explicitly provided for by law or by the collective contract and referring to special situations. Furthermore, since the obligation to do work comes under the category of *facere* obligations, it is linked to the co-operation of the employer so that, when such co-operation is not forthcoming, the specific *facere* cannot be implemented. In such a situation, however, reference must be made to the causes of the lack of co-operation of the employer, in the sense that if such causes are ascribable to the employer, the employee is entitled to remuneration if he has remained at the company's disposal, while, if the labour service could not be performed owing to causes not ascribable to the employer, the right to receive remuneration cannot be claimed. This is confirmed in the provisions governing labour relations involving clerical staff introduced by Article 6 of RDL No. 1825 of 13 November 1924, which ensures that the employee shall receive normal salary "in the case of suspension of work due to facts depending on the owner". In actual fact, the petitioners are not challenging these principles; they merely claim that, in its initial stages, the suspension was implemented by the employer and that the requisition itself is not a suitable means for removing the suspension "in so far as the only manifestation of willingness that could put an end to the suspensions was the resumption of work". However, it must be pointed out that, as indicated in the documents produced by the petitioners themselves, the suspension implemented by the Marzotto Company was limited to the period 10 June-22 June 1986, for which period the employees received their normal salaries, which were also paid for the entire month of June. However, by means of an urgent resolution notified on 25 June 1968 the Pisa communal council ordered the requisition of the Marzotto factory and, as a result of this order the Marzotto Company was deprived of possession of the plant, thus entraining the absolute, albeit temporary, impossibility for the requisitioned company to avail itself of the labour services. It is a known fact that "requisition in use" gives rise to compulsory temporary transfer of the enjoyment of property from the owner (and anyone else entitled to enjoy the good) to another subject, and so obviously deprives the owner of the possession of the thing requisitioned.

It cannot therefore be claimed in this case that the suspension of working activity in the Marzotto plant after its requisition by the Commune of Pisa can be attributed to the company. It must be borne in mind that the basic premise common to all kinds of requisitions is that they involve the need to satisfy an urgent public need (Art. 835 of the Civil Code), for which a private interest must be sacrificed. Therefore, in the present case, as a result of the requisition order, on the basis of which the communal authorities took over the Marzotto factory in Pisa, the company was objectively prevented from making use of the company, from organizing its activities and from making use of the labour services of the employees, the employment status of whom was suspended in view of the temporary nature of the requisition.

In point three of the petition it is claimed that Articles 2099, 2094 and 2082 of the Civil Code have been breached with reference to Article 360, No. 3, of the Code of Civil Procedure, in that the Marzotto Company, by engaging in activities in other companies located in Italian territory, should have spread the risks involved in the Pisa plant over its entire management; all the more so, in that, by paying the salaries both before and after requisition it had shown its intention to maintain its employees at its disposal and would not have been forced to suspend activity during the requisition.

Also this claim is unfounded. That is, once it has been ascertained that the "requisition in use" suspends the employee-employer relationship for the whole duration of the requisition period, the employer cannot be held responsible for paying the salaries of the employees during this period because the suspension of the work cannot be attributed to him but is due to the *factum principis*. Nor can it be legitimately maintained that, since the Marzotto Company owns other companies in Italy it should have spread the risk of the Pisa company over its entire group; apart from the fact that every company is independent, it can clearly be stated that the employer cannot be made to pay, the negative consequences of a fact for which he is not responsible.

Furthermore, once the owner has been deprived of the possibility of making use of the industrial complex, the employer has no further opportunity for managing the company and therefore, as the court of appeal has correctly pointed out, the Marzotto Company could not undertake any activity or even dismiss its employees.

The fourth and last point in the petition alleges a breach of Article 2099 of the Civil Code with regard to Articles 1321 and 1493 of the Code itself. They claim that, should the requisition order be considered a *factum principis* leading to the impossibility of continuing the employee-employer relationship, Article 1463 of the Civil Code regulating its termination should be applied. On this point it must be observed that the "requisition in use" of property merely determines the suspension of the existing employee-employer relationship and not its termination. However, Article 1256 of the Civil Code, which regulates the cases of definitive or temporary impossibility makes provision for termination only in the former case.

The petitioners further claim that the court, in its decision, should not have distinguished, even *incidenter tantum*, between the requisition order from the standpoint of its legitimacy, particularly since the company had not made any appeal to the Council of State. This complaint is completely unfounded inasmuch as the Court of Appeal, even though it made a number of considerations concerning the legitimacy of the requisition order, explicitly stated that the dispute should be settled irrespective of whether the order was legitimate or not and that it was merely a question of ascertaining its effects in order to determine the importance of the requisition vis-à-vis the existing employee-employer relationship.

The further complaint by the petitioners, namely, that the court gave insufficient grounds for the Commune's responsibility for paying the employees' salaries during the requisition period is also considered of no importance since they made no claims against the Commune, against which only the Marzotto Company made a claim which was rejected on the grounds of lack of active legitimation. The incidental appeal made by the Commune of Pisa is hereby declared to be inadmissible.

As the completely victorious party, the Commune cannot complain about the decision appealed against, from which it need fear no damage, even with reference to possible future situations, since the Court of Appeal (except for a few somewhat abstract observations made when justifying its decision) basically went no further than to declare the inadmissibility of the appeal by the Marzotto Company against the Commune for lack of active legitimation, that is, it abstained from finding on the legitimacy of the claim, so that it would be quite illogical to allow of censure concerning the merits of something about which the court made no decision because it was not obliged to do so.

Since there exists fair reason, the court deems that the costs of the Cassation decision should be shared fully by all the parties in the proceeding.

For the above reasons, etc.

Document 24

DECISION NO. 198 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF ABRUZZO, DATED 30 DECEMBER 1974, *FORO AMMINISTRATIVO* (1976), I-II, 453

[Italian text and English translation not reproduced]

Document 25

DECISION NO. 3 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF PUGLIA, DATED 28 JANUARY 1975, *FORO ITALIANO*, 1976, III, 31

[Italian text and English translation not reproduced]

Document 26

DECISION No. 208 OF THE CONSIGLIO DI STATO, SECTION IV, 25 FEBRUARY 1975, *CONSIGLIO DI STATO*, 1975, I, 110

[Italian text not reproduced]

208 — 25 FEBRUARY 1975 — PRESIDENT PEZZANA, DRAFTSMAN RICCIO — MUNICIPALITY OF VERCELLI (LAWYER FERRARIS) AGAINST VERCELLI AND OTHER

ATTACHMENT — JURISDICTION — ARTICLE 71, SECOND PARAGRAPH, LAW NO. 2359 OF 1865 — URGENCY POWER OF THE MAYOR — EXERCISE OF POWER IN CASE OF LACK OF URGENCY — UNLAWFULNESS — MAKING VOID BY THE PREFECT — LEGITIMACY.

The Mayor can righteously exercise his power to dispose of private property, in case of a state of serious public necessity which needs to be dealt with without delay only when, pursuant to Article 71, 2nd paragraph, Law 25 June 1865, No. 2359, the urgency is such that not even the delay necessary to inform the Prefect (who is entitled to order the temporary occupancy of properties, pursuant to 1st para. of the above-mentioned Art. 71) is possible, and neither to wait for him to issue the measure; therefore, the Prefect lawfully cancels the attachment measure which was passed by the Mayor of the Municipality (which is the chief town of the province, and where the Prefect has its seat), without proceeding to thorough investigations, the defect of the measure being *ictu oculi* evident, as it was passed when a very serious state of urgency was lacking[1].

Fact. The claim is brought against the measure of 15 January 1969, with which the Prefect of Vercelli has cancelled the decree of the Mayor of Vercelli of 14 January 1969, ordering the attachment of an industrial factory, pursuant to Article 7 of the Law No. 2248, encs. E, of 20 March 1965, in view of its next closing down.

Jurisdiction. 1. The Bench believes it appropriate, for logical reasons, to examine the second ground of appeal. With such ground, the appellant infers the defect of action *ultra vires*, for failure to check fact and law requirements in so far as the quickness with which the decree of the Prefect was passed, shows by itself the impossibility to have proceeded to sounder verifications about the conditions which had determined the issuing of the Mayor's decree.

The objection is groundless and cannot be accepted. In fact, Article 7 of Law No. 1865 of 20 March 1865, encs. E, entitles the administrative authority with the power to dispose of private property, in case of a state of serious public need which must be dealt with without delay. Article 71 of Law 2359 of 25 June 1865 identifies in the Prefect the authority which, when faced with need and urgency requirements, may order the temporary occupancy of property. It is true that the second subparagraph of the above Article 71, gives equal power to the Mayor but demands, in order that the Mayor can lawfully pass a decree, that urgency is such "to allow not even the necessary delay to inform the Prefect and wait for its decree" (Council of State, IV section, 26 May 1972, No. 388 *in questa* Rassegna 1972, I, 999).

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[1] See, in general, Vth section of 26 May 1972, No. 388 in the "Rassegna" 1972, I, 999.

But these grounds were not to be found in the present case, the Prefect having its seat in the Municipality of Vercelli. The Mayor's decree was therefore unlawful *ictu oculi*, and thorough investigations were not required to ascertain the defect. It is therefore clearly groundless to infer, as a symptom of action *ultra vires*, the quickness with which the measure was passed; this shows a superficial assessment of requirements.

2. With the first ground of appeal, the challenged measure is being objected to, for failure of justification. Such consideration is also wrong. In fact, in the Prefect's decree which we examine, it is clearly stated that "the competence of the Mayor to pass such measures can only be admitted in the occurrence of such a serious state of emergency as is not to be found in the present case". This is an exhaustive opinion, as it points out the Mayor's defect of jurisdiction in the present case, pursuant to what has been underlined above.

The claim therefore is to be dismissed. No measure whatsoever is to be taken concerning the costs, as the Administration and the concerned counterparty did not appear.

Document 27

DECISION NO. 210 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF LOMBARDIA, DATED 30 LUGLIO 1975, *RASSEGNA DEI TAR*, 1975, I, 3076

[Italian text and English translation not reproduced]

Document 28

DECISION NO. 21 OF THE CONSIGLIO DI STATO, SECTION IV, DATED 18 JANUARY 1977, *CONSIGLIO DI STATO*, 1977, I, 67

[Italian text and English translation not reproduced]

Document 29

DECISION NO. 72 OF THE CONSIGLIO DI STATO, IV SECTION, DATED 7 FEBRUARY 1978, *CONSIGLIO DI STATO*, 1978, I, 169

[Italian text not reproduced]

72 — 7 FEBRUARY 1978 — PRESIDENT PEZZANA, DRAFTSMAN SCHINAIA — MAYOR OF GENOA (LAWYERS GERMANI, MOLLE AND ROMANELLI) AGAINST TORRINGTON CO. (LAWYERS CAMILLI AND MINIERI), PARODI AND OTHER, PREFECT OF GENOA AND OTHERS (APPEAL, REGIONAL AND ADMINISTRATIVE TRIBUNAL — TAR) LIGURY, 23 JUNE 1976, NO. 209, IN "RASSEGNA" TAR 1976, I, 2874: CONFIRMATION.

MAYOR — GOVERNMENT OFFICER — PUBLIC PLEADING — EXCLUSION — QUALITY OF CIVIL SERVANT — EXCLUSION.

ATTACHMENT — JURISDICTION — MAYOR'S POWERS — ARTICLE NO. 7, LAW NO. 2248 OF 1865, ENCS. E — SUBSIDIARY ACTION RELATED TO PREFECT POWER — REQUIREMENTS — URGENCY.

The Mayor, although acting as a government officer, cannot be the counterparty purely and simply, of an organ of the State Administration, which is entitled, pursuant to Article 1, RD 30 October 1933, No. 1611, to the *ex lege* pleading of the State advocacy; in the same way, he cannot technically be considered a civil servant depending on a State Administration, even when he commits some acts pursuant to such qualification[1].

The power which the Mayor is entitled to, to issue urgent measures, pursuant to Article 7, No. 2248, encs. E, Law 20 March 1865, in its quality of government officer, disposing of private property, as in the case of seizure of an industrial factory on clearance, in order to prevent its closing down with an ensuing loss of jobs on behalf of workers, is secondary when compared with the power primarily pertaining to the Prefect, pursuant to the provisions of Article 71, 1st paragraph of Law No. 2359 of 25 June 1865; therefore, the Mayor is entitled to pass such measures only when the urgency to provide is such that a timely intervention of the Prefect is not possible[2].

Fact. The claim has been brought on appeal against the Regional Administrative Tribunal (TAR) sentence specified in the above title, with which was made void the decree of attachment concerning the factory belonging to Torrington Co., Ltd., located in Genoa, issued by the Mayor of the same town.

Jurisdiction. The defence of the summoned Torrington Co., Ltd., has inferred preliminarily the inadmissibility of the appeal, arguing that the Mayor of Genoa, having relied on such ground in its quality of government officer, was to be defended not by an independent lawyer, but by the General Advocacy of the State, pursuant to Law No. 260 of 25 March 1958.

The exception is groundless.

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[1] See IV — section, 5 Nov. 1969, No. 668, in the "Rassegna" 1969, I, 2087; as well as Vth section, 14 December 1957, No. 1130, ivi 1957, I, 1628.

[2] Uniform Law — see V — section, 18 Jan. 1977, No. 21 — Vth section, 24 June 1976, No. 983 and IV section, 25 February 1975, in the "Rassegna" 1977, I, 67; 1976, I, 781; 1975, I, 110.

In fact, apart from the irrelevant reference to Law No. 260 of 1958, if we are to refer to the only text approved by Royal Decree No. 1611, 30 October 1933 — we must observe that the Mayor of Genoa, although having acted (or having considered to act) as a public officer, cannot purely and simply be considered as the counterpart of an Organ of the State Administration which is entitled, pursuant to Article 1 of the above Royal Decree, to the *ex lege* pleading by the State advocacy; in the same way, he cannot be technically considered a civil servant depending on a State Administration, even when he carries out some acts in its quality of government officer (see section IV, 5 November 1969, No. 668 and section V, 14 December 1957, No. 1130, in the "Rassegna" 1969, I, 2087; 1957, I, 1628). The fact is, anyway, that the above-mentioned Mayor asked the Prefect during the first degree of proceedings, for the pleading of the State Advocacy to which nevertheless he is not entitled primarily, even pursuant to provision of Article 71, first paragraph of Law No. 2359, 25 June 1865. As, it was said, the Mayor is entitled to pass those measures only when the urgency to provide is such that a timely intervention of the Prefect is not allowed (see State Council, section V, 18 January 1977, No. 21; *idem*, section V, 24 June 1976, No. 953; *idem*, section IV, 25 February 1975, No. 208; *idem*, section V, 26 May 1972, No. 388, in questa Rassegna 1977, I, 67; 1976, I, 781; 1975, I, 110; 1972, I, 999).

So, the first degree judge has correctly applied such principle to the case in point, providing an exhaustive justification, even regarding the argumentation brought by the Mayor's defence.

It has been especially underlined that in the present case, not only the Mayor had not stated the reasons of the special urgency for which it was not apparently possible to request and wait for the timely intervention of the Prefect of Genoa, but that, on the other hand, it emerged from the same Mayor's decree that the situation which had come into being, following Torrington Co., Ltd.'s clearance, was a long-standing one, and therefore the Prefect, being institutionally entitled to the safeguard of public security could not fail to know the consequences that could be determined on public security by the dismissal of the employees who for such reason, had since a long time occupied the plant.

Therefore it has been considered with exactitude that there was a lack of competence (jurisdiction) on behalf of the Mayor, and such principle must be reconfirmed.

The appeal therefore is to be dismissed without taking into examination in the present instance the objections relied on by Torrington Co., Ltd., in the first degree proceedings, which were regarded as being accepted.

The Mayor of Genoa having lost suit, is convicted to pay for the costs and fees of the proceedings in respect of Torrington Co., Ltd., in clearance, which are altogether settled for this second degree of proceedings at 500,000 liras (Five hundred thousand liras) altogether.

Instead, the costs and fees relating to the defence of the Prefect of Genoa must be entirely indemnified.

Document 30

CERTIFICATE OF THE MINISTRY OF THE INTERIOR CONCERNING THE AVERAGE TIME TAKEN TO EXAMINE THE APPEALS

[Italian text not reproduced]

MINISTRY OF THE INTERIOR, OFFICE OF THE MINISTER

TO WHOM IT MAY CONCERN

This is to certify that before the entry into force of the Presidential Decree No. 1199 of 1971 (which not only made it optional to submit appeals through the hierarchy, but established the principle that the absence of a reply to an appeal lodged with the public administration within 90 days of the matter giving rise to it signified rejection) the average time taken to examine appeals used to be about one year.

The time could be further reduced if the parties requiring a prompt reply used the "Diffida" (= intimation) procedure provided by section 5 of Law No. 383 of 3.3.1934 governing this matter.

22 June 1987. (Initialled by the Chef de Cabinet).

Document 31

EXCERPTS FROM THE DECISION OF THE BOARD OF DIRECTORS REGARDING THE MERGER OF ELSI S.P.A. WITH SELIT (1965)

[Italian text not reproduced]

(Omissis)

Raytheon-ELSI S.p.A. is the registered holder and owner of all 1,300,000 shares for Lire 1,000 each, making up SELIT share capital; the merger shall result in the annulment — without replacement — of the said shares, and will be carried out once the merger deed has been drawn up.

(8) *(Omission)* in order to avail themselves — for the merger envisaged by the present resolution, aimed at upgrading Raytheon-ELSI S.p.A.'s industrial activity in Southern Italy — of the tax relief provided for in the existing legislation for the industrialization of the South, or in regional laws, and in particular of the provisions under Article 38 of law No. 634, dated 29 July 1957, and of the provisions under law No. 2 of 20 March 1950, and of law No. 51 of 5 August 1957.

(9) To confer power of attorney upon the Chairman of the Board of Directors, Professor C. L. Calosi and the Managing Director, Eng. Aldo Profumo, also severally and *(omission)*.

(5) *Resolution on the taking out of a loan from Banco di Sicilia and relevant power of attorney:* The Chairman reports on the negotiations under way with Banco di Sicilia for the taking out of a soft mortgage loan amounting to one billion and five hundred million lire, and calls upon the Board of Directors to consider the matter, conferring the appropriate powers of attorney and rights in connection with the taking out of said mortgage.

The Board, after a lengthy debate — with the favourable opinion of the Board of Auditors — decides to severally authorize Professor Carlo L. Calosi (born in Intra on 25 September 1905), the Managing Director Eng. Aldo Profumo (born in Genoa on 15 October 1917) and Accountant Nicolò Fiandaca (born in Agrigento on 1 February 1926), acting in their capacity of legal representatives of the company, to take out from Banco di Sicilia — Division for Credits to Industries — a loan amounting to lire 1,500,000,000 (one billion five hundred million), to be paid over a five-year period, under Article 5 et seq. of regional law No. 51 dated 5 August 1957, interest rate of 4 per cent and accessories, correlated by the securities envisaged in Article 12, last but one subparagraph, of the said regional law No. 51 of 5 August 1957, as well as by the suretyship of the associated "Raytheon Company" of Lexington, Mass. (USA), for 50 per cent of the whole amount of the loan.

The Board subsequently and severally authorizes them to enter into the mortgage contract with the Division for Credits to Industries of Banco di Sicilia, in the name and on behalf of the said Company, conferring upon them for this purpose the widest powers and rights (such as the right to grant lien and mortgage on all the Company assets, for an amount to be determined by the abovementioned Division, incurring — on behalf of the Company — all the expenses of the relative contract or relevant to it), on the basis of terms and conditions to be requested by *(omission)*.

(omissis)

Document 32

NOTES AND COMMENTS CONCERNING THE BOOKS AND THE DOCUMENTS ATTACHED TO THE PETITION IN BANKRUPTCY[1]

[Italian text not reproduced]

Raytheon ELSI S.p.A.

NOTES AND COMMENTS ON THE BOOKS AND DOCUMENTS ATTACHED TO THE BANKRUPTCY PETITION

(A) Inventory Book No. 3

Note: (1) books No. 1 and No. 2 are kept at the company plant premises in Palermo and are currently requisitioned by order of the Mayor. Mr. Giuseppe Polizzotto, who was given the task of getting them, was prevented from doing so by a certain Mr. Riccobono, who claimed that the books could not be removed without the Mayor's approval. At the request of a member of the company management, Mr. Maggio, the Mayor's substitute during his absence, refused permission to remove the books (see attached declaration).

Note: (2) the book produced contains the inventory as at 30 September 1966. The inventory as at 30 September 1967, which should have contained the balance sheet approved on 20 March 1968, had not yet been transcribed into the book, the legal period for doing so having expired on 27 June 1968.

Note: (3) the information concerning the inventory as at 30 September 1967 can be found in the balance sheet as at 30 September 1967 and related annexes.

(B) General Ledger

Note: (4) this book contains annotations from 15 June 1967 to 30 September 1967. Annotations prior to the date of 15 June 1967 are contained in other volumes of the General Ledger current kept in the requisitioned plant, and for which the remarks made in note (1) above also apply. It was not possible to make any annotations after 30 December 1967 because of the succession of circumstances that occurred to prevent this: the Christmas holidays, the earthquake, a strike with the occupation of the plant by the employees and, lastly, the much publicized requisition order.

(C) Clients Ledger

Note: (5) this book contains the annotations from 11 March 1967 until 29 December 1967 (see preceding note).

(D) Suppliers Ledger

Note: (6) this book contains the annotations from 28 October 1966 until 30 January 1968 (see preceding notes).

[firmato]

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[1] For an English translation of the petition, see Memorial of the United States, Ann. 43.

Document 33

TELEX NO. 570/2 OF 6 APRIL 1968 FROM THE MAYOR OF PALERMO TO AVVOCATO NICOLÒ MAGGIO AND DR. ARMANDO CELONE

[Italian text not reproduced]

Messrs. Dr. Armando Celone
Avv. Nicolò Maggio.

In my capacity of Government Official, having issued on 2.4.1968 an order requisitioning the plant owned by Raytheon-ELSI S.p.A., I appoint you as my representatives and entrust you with the task of ensuring the enforcement of the orders and provisions already issued or still to be issued, giving me daily reports on the management activities performed by the special appointee Ing. Aldo Profumo who, in his turn, shall be obliged to request your prior approval for the measures to take in the fulfilment of the management tasks conferred upon him.

(Signed) BEVILACQUA.

Ref. 570/2
6 April 1968.

Municipality of Palermo
Certified copy
Palermo 27 June 1987
Deputy Secretary-General
(Signed) Avv. Nicolò MAGGIO.

Document 34

TELEX NO. 568/2 OF 6 APRIL 1968 FROM THE MAYOR OF PALERMO TO INGEGNERE PROFUMO

[Italian text not reproduced]

Ing. Aldo Profumo
General Manager
of Raytheon-ELSI S.p.A.
Palermo.

Pursuant to the requisition order of 2 April 1968, of the Raytheon-ELSI S.p.A. plant, I entrust you with the management of the said plant in order to avoid any damage to the equipment and machinery due to the abandoning of any activity, including maintenance.

Furthermore, I order that an inventory of the plant assets be drawn up, with the assistance of Dr. Giuseppe Marsala, Notary Public, and on the basis of the rebuttal of the legal attorneys representing Raytheon-ELSI S.p.A., who are to be notified of the date of the beginning of the operations of which you are in charge.

I inform you that I have appointed Dr. Armando Celone and Avv. Nicolò Maggio as my proxies, and I have entrusted them with the task of ensuring the compliance with the provisions I have issued or which are still to be issued.

As my proxy, therefore, you will request the prior approval of the persons cited above for the action to take in the fulfilment of the management tasks you have been entrusted with.

(Signed) BEVILACQUA.

Ref. 568/2
6 April 1968.

Municipality of Palermo
Certified copy
Palermo 27 June 1987
Deputy Secretary-General
(Signed) Avv. Nicolò MAGGIO.

Document 35

LETTER FROM THE MAYOR OF PALERMO ENTRUSTING INGEGNERE LAURIN WITH THE MANAGEMENT OF THE PLANT, 16 APRIL 1968

[Italian text not reproduced]

Palermo, 16 April 1968.

Dear Mr. Silvio Laurin,

In view of the continuing absence of Mr. Profumo to whom the management of the factory had been entrusted following attachment, I hereby appoint you as his temporary replacement with the same powers, functions and limitations.

You have been chosen because of the need to ensure total compliance with the orders I have issued, and the need for the management activities to be co-ordinated and the interests of Government and the rights of third parties are properly protected.

Your duties are particularly appropriately connected with your functions and responsibilities as Security Officer, and this is a warranty against any interference with military security requirements.

In the performance of your duties, you shall report to my deputies and personally to me on any matter relating to the activity and running of the factory and you shall assist Notary Public Marsala to begin the inventory operations today.

(Signature illegible.)

Municipality of Palermo: This is to certify that this is an authentic copy of the original. Palermo, 27 June 1987.

Document 36[1]

MAGISTRATES COURT OF PALERMO, INSOLVENCY SECTION, TECHNICAL-ACCOUNTANCY ADVICE ON "RAYTHEON-ELSI" S.P.A., FROM THE FINANCIAL YEAR 1964/65 TO 31 MARCH 1968 (TECHNICAL ADVISOR: DR. GIUSEPPI MERCADANTE)

[Italian text not reproduced]

RAYTHEON ELSI S.P.A. — PALERMO

Technical Report on the Management of the Pre-Insolvency Period 1965-1968

1. History — Organization Chart — Directors — Accounting Records

In 1954 Elettronica Sicula S.p.A. was incorporated with a share capital of Lit. 1,000,000 with the objective of manufacturing cathode tubes, X-ray tubes and electronic supplies for the new market that would be created with the introduction of television in Italy.

Subsequently, in 1959, Selit S.p.A. was incorporated and took over the manufacture of cathode tubes only, while the administrative services remained under the management of "Elettronica Sicula" (ELSI).

Limited evidence will be given in this report as to the initial development that Elettronica Sicula had in the manufacture of cathode and X-ray tubes. It is, however, certain that over a period of ten years, at the end of which our investigation starts, the Company did not effectively penetrate the market. Thus it is possible that the decision taken by the management in March 1968 matured some time previously.

Although Selit, incorporated in 1959, belonged to "La Centrale" and to "Thomas Electronic" companies well known both in Italy and abroad, Elettronica Sicula was not given adequate support by them.

On 4 October 1962, Elettronica Sicula S.p.A. changed its name to Raytheon ELSI S.p.A. since the North American group Raytheon of Lexington (USA) became the major shareholder. At this time Raytheon ELSI decided to purchase all the shares in Selit thereby becoming its agent.

During 1965 (20 September) Raytheon ELSI incorporated Selit cancelling all its shares. This transaction, the most recent, was undertaken as follows:

(1) The resolution for the merger of Selit into Raytheon ELSI was taken at the meeting held on 31 March 1965 to approve the financial statements of both companies at 30 September 1964. This merger was legally executed by Notary Di Giovanni in Palermo on 20 September 1965 on the basis of the balance sheets of the two companies at 30 September 1964.

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[1] By a letter dated 7 March 1988, the Agent of Italy submitted a revised translation of Document 36 which was substituted for the former translation by decision of the President of the Chamber. However, the unrevised version was referred to in some instances during the Oral Arguments (see **III**, Argument of Professor Libonati). *[Note by the Registry.]*

(2) With the merger the entire share capital of Selit was cancelled and Raytheon ELSI added to its equity all the assets and liabilities of Selit with a share-capital of zero, since the profit of Lit. 16,129,377 shown by Selit at 30 September 1964 was taken in reduction of goodwill in accordance with a decision of the shareholders' meeting.

(3) In the balance sheet of Raytheon ELSI at 30 September 1964 the item "payables" included an amount due to Selit of Lit. 1,503,584,209, whilst Selit showed an amount of Lit. 1,540,728,150, the difference of Lit. 37,143,941 being receivable from the other agent (Generale Elettronica).

(4) The investigations carried out on the financial statements of Raytheon ELSI and Selit at 30 September 1964, regarding the transactions between the two companies from inception until the date of the merger, resulted in a decrease in receivables of Lit. 938,753,000.

Before examining the management for the three-year period prior to the declaration of insolvency by Raytheon ELSI S.p.A., it should be remembered that at the same time two other companies, both still in existence, operated in the same field of radiologic products, Fitra S.p.A. (share capital Lit. 60 million) and Columbus S.p.A. (share capital Lit. 60 million), the former in Central Italy and the latter in North Italy. The recent manner of management of these companies is not known, though it appears that they are heading for liquidation, but consideration must be given to the fact that their results greatly affected Raytheon ELSI since the latter in effect absorbed their heavy losses.

In this respect, a report on the management of Fitra and Columbus has been found covering the period from incorporation through 31 December 1963, and during this investigation evidence will be given of occasions on which Raytheon ELSI absorbed heavy losses on their behalf, including the payment of taxes relative thereto.

Organization chart

The organization chart of Raytheon ELSI S.p.A. during the latter period was as follows:

Two managing directors under whom were the following Divisions:

(a) *Production*

— TMX which manufactured microwave tubes,
— TRC which manufactured cathode tubes,
— SCD which manufactured electronic supplies (semiconductors).

(b) *Administration*

— financial,
— general and industrial accounting,
— ACU and personnel services.

(c) *Commercial*

One commercial and three sales managers.

Those responsible for the various sections during the latter period were Messrs:

The managing directors with equal powers and single signatures:

— Ing. Aldo Profumo,
— Mr. Yustin Guidi,

were responsible for the technical and commercial management of the whole company.

The administrative managers were:

- Mr. Mazzotti — administration manager,
- Rag. Fiandaca — financial manager,
- Mr. Nett — chief accountant.

The head of the commercial division was Ing. Secondo Rovelli, and under him were the following sales managers:

- TMX — Mr. Mandel,
- TRC — Ing. Burzilleri,
- SCD — Mr. Charman.

Accounting and legal books

Apparently the Company, during the latter period, maintained its accounting records correctly using mechanized accounting procedures for the "general accounts" and "accounts payable journal", whilst the cost accounting records and "accounts receivable journal" were kept by an IBM centre that prepared the perpetual inventory records.

With regard to the "general accounts", the journal was not kept in accordance with legal requirements in that the entries were not progressively numbered, in the sense that each transaction shown in the "prima nota" was recorded without making any reference thereto and without using a progressive system of numbering. This is a very serious and incorrect procedure since the pages were numbered but not signed by a notary public and it would have been possible to insert any transaction in a blank space without the possibility of this subsequent insertion being discovered. It was further noted that at the date of insolvency the "general accounting" and supplementary ledgers were updated to 30 December 1967.

There is no major note with regard to the keeping of the legal books (shareholders' registers, Board of Directors' and Statutory auditors' minute books, etc.).

2. *Analysis of Production*

The investigation of the production sector resulted in very few matters that could justify the losses incurred by Raytheon ELSI through the year ended 30 September 1967.

A more practical knowledge of this technical sector would have permitted a more detailed investigation of the single factors involved in the manufacture of the following products:

- cathode tubes,
- electronic supplies (semiconductors),
- X-ray tubes,
- other microwave products.

The major portion of production (65 per cent) concerned cathode and X-ray tubes whilst semiconductors accounted for only a minor part of the production sector.

An analysis of production in the three year-period immediately prior to the date of insolvency has given inconsistent results with regard to the incidence of direct labour costs on quantities sold.

This negative factor is found again in the different manners of preparing the financial statements, some of which only showed a non-detailed profit and loss account, whilst in others it was possible to analyze the various production expenses.

This diversity was suggested by management and accepted by the statutory auditors, and we believe it was carried out in a cursory manner, thus it would not be possible to analyze costs that were higher than would normally be expected.

Only for the period 1/10/1966 to 30/9/1967 was a budget found that could be compared with the actual results for the period. A comparison between these financial statements and the budget (prepared in English) has lead us to believe that the loss could be considered "worse than expected".

We will now consider the analysis of production for the penultimate financial year 1965/66 on the basis of the results of the official financial statements which showed a loss of Lit. 2,187,486,904.

It should be remembered that this loss represented more than half the share capital of Lit. 4 billion, without taking into account the accumulated losses of prior years at 30 September 1966 Lit. 262,573,096, thus giving a total accumulated loss at such date of Lit. 2,500,000,000.

At this point it must be pointed out that these financial statements are the first after the merger Raytheon ELSI-Selit in September 1965; thus the 1965 loss of Selit which should be Lit. 362,573,096, less Lit. 47,529,111 representing the losses of Raytheon, becomes more notable in the subsequent financial year.

What is the reason then for such a huge loss after only one year of management of the combined companies?

There is reason to believe that:

(1) The losses of Selit that operated as a purchaser from Raytheon ELSI until 1964 were included with its assets for an amount greatly superior to the difference between its share capital and the loss for the year Lit. 985,017,000 (Lit. 1,300,000,000 less Lit. 314,983,000).

(2) Owing to the similarity of production of the two companies, that in years 1964 through 1966 had approximately the same sales volumes, there could not have been increases in costs (even though they did increase enormously over the period of three years) which would have caused the company to go from a profit position, even if slight, of Lit. 16,129,377 in 1964 to a loss one of Lit. 2,137,000,000 in 1966.

The following are the details of the above in Lire/million.

	1964	*1965*	*1966*
Sales Selit	4 232	–	–
Sales Raytheon	2 529	8 519	8 242
Total sales	6 761	8 519	8 242
Profit (Loss)	16	(47)	(2 137)
(in millions of Lit.)	14	(314)	–

In order to consider such losses as related to the industrial management, even though at first glance this is not apparent, it should be remembered that the single factors of production have been so distorted from one year to the next that the loss should be increased fifty-fold in prior year (1965: Lit. 47,529,111 net loss). Thus owing to the constancy of the gross margin foreseen as such in the budget and considering a small decrease in the inventory valuation, the incidence of direct costs should be approximately the same (58-60 per cent) as can be seen in the budgets for the years ended 30 September 1966 and 30 September 1967. Since such parameters in similar conditions (equal volume of sales, same market conditions, etc.) are not possible, there is no doubt that falsified elements have affected the results of the entire management and such hypothesis is further strengthened when it is considered that in certain years the industrial expenses are shown in the profit and loss whilst in others they are not.

The figures below demonstrate more precisely the unrealiableness of the results, with regard to the true situation and to the volume of sales as well as the movements in inventory.

(A) Ratios between Sales and Direct and General Costs

Sales	*1963/64*	*1964/65*	*1965/66*	*1966/67*
Selit	4 232	—	—	—
Raytheon ELSI	2 529	8 519	8 242	7 143
Total	6 761	8 519	8 242	7 143
	(100%)	(100%)	(100%)	(100%)
Costs				
Labour	2 134	2 869	2 614	2 616
Sales expenses	289	238	527	432
Interest payable	676	917	879	926
Depreciation	507	695	560	573
Sundry and consumables	782	975	761	859
Various — Royalties	23	119	79	109
Total	4 411	5 813	5 420	5 515
	(65%)	(68%)	(66%)	(77%)
Inventory	2 350	2 706	1 822	1 628
Difference	(2 507)	(3 020)	(4 193)	(4 323)
Loss	(157)	(314)	(2 371)	(2 695)

(B) Analysis of Movements in Inventories

Opening inventory	2 871	5 210	5 550	6 029
Opening inventory	1 962	—	—	—
Purchases	882	3 984	5 067	4 230
Purchases	3 171	111	118	—
Charges to inventory	8 886	9 305	10 735	10 259
Final inventory	2 806	5 550	6 029	5 564
Final inventory	2 404	—	—	—
Revaluation	76	57	46	—
Study	665	678	467	372
Study	429	—	—	—
Withdrawal	6 379	6 285	6 542	5 926
Usage	2 507	3 020	4 193	4 323

It is evident from the above summary how the final inventory in the two years 1965/66 and 1966/67 has been modified in order to align the preceding year with the present with an increase of approximately Lit. 1 billion.

The extraordinary income and losses and other expenses have been removed from the summary showing the relationship between sales and direct and general costs, including inventory costs.

3. Investigation of Direct and General Costs

(a) *Labour*

We must consider first of all, that in spite of the adoption of an efficient cost accounting system and a profit and loss account at year end which shows detailed labour costs, it is felt that the analysis of the direct labour costs and of general costs with regard to the final three-year period, has been possible from information contained in the general accounting records. See Attachment 1 which summarizes all the labour costs for the last three years.

Taking into account that salaries and wages are shown as a single item in the profit and loss account, it is possible to state that labour costs (employees, workers and management) is equal to 33.67 per cent in 1965/66, to 31.71 per cent in 1966 and to 36.62 per cent in 1967, of sales.

The following expenses should be added to these.

(b) *Travelling expenses* in the various years:

1965	Lit.	89,358,000
1966	Lit.	127,040,000
1967	Lit.	94,896,000

Approximate costs not properly supported by appropriate documentation.

(c) *Donations* which would not have been included as such in the accounts, considering their nature:

1966	Lit.	4,950,000
1967	Lit.	9,470,000

Since these expenses are neither directly nor indirectly attributable to production, they must be considered as licentiousness on the part of the directors, as it is of no importance that they account for only a very small percentage of the huge volume of costs of the Company.

(d) *Hotel expenses* appear to be excessive, considering the limited number of persons to which they should refer (consultants, directors of Raytheon USA). Since they referred to long periods of time, they should have been included in the fees of such persons, thus reducing the burden for the Company.

The expenses were as follows:

1965	Lit.	7,650,000
1966	Lit.	7,121,000
1967	Lit.	6,424,000

Finally we must mention the substantial amount of *sundry expenses* found each year, Lit. 37,733,000 in 1965; these expenses cannot be considered as such and in any case they appear excessive and incorrectly charged.

The chart of accounts relating to cost of labour is detailed enough to classify them correctly.

(e) *Analysis of sundry costs*

This group includes all those costs and expenses, either direct or general, which do not regard either production or sales.

If we leave aside those costs which, even though not properly justified, are of modest amount, the following is our analysis of these costs which appearing frequently are of a significant amount. Amongst the various costs which left us in some doubt are the large amounts relating to *costs for assistance to Raytheon* as follows:

1965	Lit.	61,932,000
1966	Lit.	96,998,000
1967	Lit.	104,328,000,

which were added to *royalties* paid in:

1965	Lit.	119,405,791
1966	Lit.	79,481,279
1967	Lit.	75,284,877.

Details of the account "Technical Consultancy Services" (extract from the book "payments to third parties"):

(1) *Consultancy services rendered at September 1967*

— Mr. Helmut Post	Lit.	9,000,000	
— Mr. Conoscenti	Lit.	320,000	
— Dr. Giuseppe della Ragione	Lit.	5,000,000	
— Mr. Helmut Post	Lit.	375,000	
— Mr. James Conoscenti	Lit.	320,000	(monthly)
— Ing. Kunig Harbert	Lit.	11,682,000	(21 July 1967)
— Dr. Giuseppe della Regione	Lit.	5,687,708	(23 June 1967)
— Mr. Walter Jaeger	Lit.	2,713,744	(17 April 1967)
— Mr. Walter Jaeger	Lit.	8,726,631	(9 March 1967)
— Mr. Walter Jaeger	Lit.	3,400,000	(31 Oct. 1966- 9 Feb. 1967)
— Mr. Walter Jaeger	Lit.	1,772,291	(18 Oct. 1966).

(2) *Consultancy services rendered at 30 September 1966*

— Mr. Ralph D'Amato	Lit.	5,500,000
— Mr. Walter Jaeger	Lit.	19,279,785
— Mr. James Conoscenti	Lit.	3,840,000
— Mr. Ralph D'Amato	Lit.	1,000,000.

(3) *Consultancy services rendered at 30 September 1965*

— Ing. Walter Jaeger	Lit.	23,677,749	
— Ing. Walter Jaeger	Lit.	10,405,742	(9 Sep. 1965)
— Ing. Walter Jaeger	Lit.	1,700,000	(30 Sep.- 28 Oct. 1965)

(4) *Consultancy services rendered and fees paid in the pre-insolvency period*

29 Jan. 1968	— Dr. Giuseppe della Ragione	Lit.	4,000,000
5 Feb. 1968	— Ing. Helmut Post	Lit.	375,000
6 Feb. 1968	— Mr. James Conoscenti	Lit.	343,000
29 Feb. 1968	— Dr. Giuseppe della Ragione	Lit.	4,500,000
29 Feb. 1968	— Dr. Giuseppe della Ragione (reimb.)	Lit.	873,317

6 March 1968	— Notary Di Giovanni	Lit. 7,600,000 (increase in share capital)
6 March 1968	— Mr. James Conoscenti	Lit. . . .

There is reason to believe that the holding company periodically paid significant amounts which greatly affected the results each year.

Leaving aside the royalties, which alone would not have been able to justify the payment of the other categories of costs, namely, *technical consultancy* fees amounting to

1965	Lit. 15,101,000
1966	Lit. 42,212,000
1967	Lit. 61,948,000

we must conclude that, in addition to the production system already in existence for which the company had since 1954 formed a technical patrimony, the Company had to add a mark-up, so that even if it is true that the poor quality of the products meant that production had to be repeated (goods returned, returns from clients, defective goods left at customs or at the client), the justification of such costs should not have permitted such occurrences.

In fact, adding all the above expenses (group assistance, royalties and technical consultancies) we obtain an overall annual amount of

1965	Lit. 196,438,000
1966	Lit. 218,891,000
1967	Lit. 241,560,000

without taking into account either the costs incurred directly within the company which, as it is known, employed a technical management team whose salaries are shown under "Salaries and wages" or the huge costs incurred for "Research and development" which will be dealt with later.

Continuing the analysis of the sundry costs in the financial statements from 1965 to 1967, there are various payments which are not justifiable. At this point we must mention the "*various expenses*" (see attachment).

Since the general management existed only in name and the components thereof were the two managing directors, there is some perplexity as to a caption found in the records for the years 1966 and 1967 and in the 1968 cash book.

An extract of the above is as follows:

29 Dec. 1966 private expenses general management	Lit. 250,000
31 March 1967 bank transfer R. D'Amato (consultant)	Lit. 2,538,429
22 May 1967 private expenses general management	Lit. 4,000,000
3 July 1967 private expenses general management	Lit. 2,200,000
28 July 1967 private expenses general management	Lit. 2,136,000
31 Aug. 1967 private expenses general management	Lit. 900,000
8 Sep. 1967 private expenses general management	Lit. 400,000
28 Aug. 1967 private expenses general management	Lit. 300,000

and again in the year 1967/68 which terminated at the end of March 1968 with the declaration of insolvency:

13 Oct. 1967 private expenses general management	Lit. 2,114,000
3 Nov. 1967 private expenses general management	Lit. 5,500,000
11 Dec. 1967 private expenses general management	Lit. 9,500,000
20 Dec. 1967 private expenses general management	Lit. 306,000
21 Jan. 1968 private expenses general management	Lit. 2,106,000
22 Jan. 1968 private expenses general management	Lit. 4,000,000

31 Jan. 1968 private expenses general management	Lit. 3,275,057
29 Feb. 1968 sundry for credit notes	Lit. 5,349,469
Total	Lit. 46,787,955

During the last part of the financial year (January-March 1968) there was a payment, for travelling expenses, to Wagon Lits Cook for Lit. 1,684,455 on 22 February 1968 and Lit. 1,329,989 on 29 February 1968, though it should be considered that the directors, staff and consultants had sufficient funds for such expenses and in such context the payment of Lit. 1,691,181 on 4 January 1968 to Ing. Barberis, who was in charge of the Paris representative office, should be noted. Another erroneous transaction during 1967 in the "general management expenses fund" is the discounting of a bill of Lit. 15,000,000 to a certain Mr. Domenico Guaiana, to whom payments were made (17 January 1967, Lit. 1,000,000 and 26 April 1967, Lit. 10,000,000) against a bill of exchange.

Mr. Guaiana's account was overdrawn for an advance on his expense account of Lit. 770,000 (see attachment).

Also with regard to the afore-mentioned noted "donations" attention should be given to the payment made on termination of the contract to Dr. Chielini on 16 January 1968.

Since Dr. Chielini was an employee of the first level, as can be presumed from his salary, and was in the company's employment since the incorporation of ELSI (1954) and considering that his monthly salary was Lit. 241,135 including for the calculation of his termination benefit the quota of the 13th-month salary, vacation, etc., and calculating one month for each year of service (15 years), his termination benefit should have been Lit. 4,200,000 against the Lit. 7,099,268 actually paid as documented in the cash book, that is, approximately Lit. 3,000,000 in excess.

(f) *Sundry costs and expenses* which should have been insignificant amounts but were, in certain years, of relevance.

Leaving aside any justifiable comment on the amounts of *interest payable* (Lit. 774,940,000 in 1965, Lit. 726,947,000 in 1966 and Lit. 926,553,000 in 1967), which leads to the assumption that at an annual rate of 10 per cent approximately Lit. 12 billion of external capital was used throughout the year, though the use of this was obviously not maximized, the result was that the financial position continued to deteriorate especially when also taking into account the medium-term loans (IRFIS, Banco di Sicilia Sez. Credito Industriale, EFI Banca, etc.) the interest on which is not included in the above amounts. At this point we must point out that this deficiency in the working capital (not remunerable on the basis of the volume of sales effected) contributed to increase the loss of the various years by a good 45 per cent.

(g) *Bad debts written off*

These costs in the financial statements for the year 1965/66 amounted to Lit. 216,254,000 as against the previous year 1964/65 (Lit. 31,926,000) and the following year 1966/67 (Lit. 38,590,000).

An investigation of the related accounts, accounts receivable, Group companies and accounts payable showed that this amount included an amount of Lit. 121,585,582 uncollectable from Fitra S.p.A. — an associated Company — managed by a certain Mr. Carlo Emanuele Ferrero — Sole Director.

Apart from the fact that this company is connected with Raytheon ELSI S.p.A., the amount of the loss was such that it was impossible not to notice it.

Further this loss resulting from an uncollectable receivable could not be written off since the reserve for doubtful debts, at 30 September 1966, had a balance of only Lit. 42,041,145.

Further with regard to the sundry provisions, discounts allowed were only shown for the following years:

1965	Lit. 34,767,000
1966	Lit. 43,277,000

with nothing shown for 1967; in fact it appears rather odd that in the whole year no discounts were allowed to customers. Instead in 1967, and only in that year, do we find *packing costs* of Lit. 30,985,000 included in selling expenses.

Finally, to complete our analysis of this group of general and direct costs, we must consider that the costs relative to accruals for prior years to the leaving indemnity fund and the rounding up of the amounts paid to personnel leaving the company's employment, were not adequately supported.

With regard to accruals for prior years made to the leaving indemnity fund, it is surprising that this was only recalculated in 1966 (Lit. 31,026,000) and in 1967 (Lit. 17,035,000); in fact in the last year, 1967, there was a provision for accruals made to the leaving indemnity fund, amongst personnel costs, for Lit. 112,512,000.

The most irregular occurrence, however, was the rounding of amounts paid to employees leaving the company, equal to Lit. 9,444,000 in 1965, Lit. 15,262,000 in 1966 and Lit. 26,159,000 in 1967.

(h) *Conclusions on our analysis of the direct and general costs*

Having concluded our analysis of direct and general costs and having carried out limited investigations on the various items included therein, it must be considered that the Company's accounts were often tampered with so that costs and/or expenses were recorded in incorrect accounts, thus resulting in a situation difficult to control, principally due to the diversity of the many costs involved, as well as the impossibility to apply set parameters to those of the same kind.

It must also be stated, however, that the classification of the costs in the "budget" made it possible to put similar costs into one or more accounts.

In this regard it was impossible to check the direct production costs, vis-à-vis those estimated in the budget with the published financial statements; it was only possible to compare them with the budgets which, for that portion which had been put into practice, showed results far worse than those shown in the financial statements.

In this connection, for the year 1965/66, whilst the budget forecast a loss of Lit. 356,100,000 equal to 4 per cent of the sales, the published financial statements showed a loss of Lit. 2,137,486,964 (see attachment).

It must be considered in this respect that the large difference (Lit. 2,137,486,964 less 356,100,000) is due to lower valuation of assets or higher estimated liabilities.

This happened again in the year ended 30 September 1967 when the difference between the budgeted loss of Lit. 1,745,400,000 and the actual loss shown in the financial statements of Lit. 2,683,460,000 was approximately Lit. 1 billion.

4. *Analysis of Sales*

At this point we do not consider that our investigations on the volume of sales for the three years 1965 to 1967 can be of any great assistance.

On a sample basis we checked the amount of purchase tax (IGE) paid over on sales in Italy as well as the deduction for foreign sales.

With regard to sales we must take into account the fact that, since to a large extent the sales were destined to clients who returned the goods or did not pay for them, this could lead to a fictitious overstatement of such sales, which remain in the end frozen in the account "accounts receivable".

We reached this conclusion by analyzing the account "accounts receivable — foreign" at 31 March 1968 which includes customers who would not have received the goods or those who would not have paid for goods regularly invoiced.

Amongst these is Lit. 246,296,774 due from Neye Alfred Enateckmer of Quickborn (West Germany); the goods (conductors) were despatched and subsequently returned, remaining in customs.

It must be remembered that in the meantime the banks had granted overdraft facilities on the basis of such exports which the company used, writing off the debt against other amounts until the end of 1967 when the overdraft (mainly with the Banca Nazionale del Lavoro) amounted to approximately Lit. 662 million (see details below).

In this manner the unsuccessful sales continued and the receivership has now instituted procedures for recovery of the related receivables.

With reference to our analysis of the sales and to certain categories of receivables, we noted that large credit facilities had been granted, as shown below:

T. Bosch Ferrau — Barcelona (Spain)	Lit. 135,335,635
Kuba —	Lit. 303,732,458
Thomson of Houston	Lit. 13,281,408

etc., and it should be remembered that the company had requested the auditing firm "Fidital" of Milan to check the amounts due from debtors.

5. *Analysis of Sundry Debtors*

In this respect, leaving aside the figure of Lit. 73,461,268 relative to advances made to staff, it is important to note, among "*Miscellaneous receivables*" and "*Other receivables*", the following:

(1) Advances to management and consultants for expenses.
(2) Receivable for the reimbursement of IGE on the exportation of goods in the last period, to be received from the finance police of Palermo for an amount of Lit. 71,878,691.
(3) Other receivables which will be detailed below.

Amongst "*Other receivables*" (the account is so entitled), the principal accounts, since they also refer to other transactions, are:

(1) The account Ing. Colombo,
(2) The account Carlo Emanuele Ferrero,

related to the financial statements at 30 September 1966.

The account *Ing. Colombo* (managing director of Columbus S.p.A.) at 30 September 1966 showed a debit balance of Lit. 82,193,039 of which Lit. 65,084,396 related to the year ended 30 September 1965. The credits to this account related to the reimbursement of advances and receipts for payment of invoices on his behalf.

During the year 1966/67 the account balance increased until it reached at 30 September 1967 a total of Lit. 190,712,698 and was written off at such time "using the taxed reserve" for the same amount.

Included in "Accounts receivable" and "Accounts payable" is a compensating entry, that is:

Accounts receivable — Debit	Lit. 25,854,705
Accounts payable — Credit	Lit. 45,547,181.

In addition, at 30 September 1967 the account "Columbus special account" was closed and was not shown in the financial statements at such date. This account had not moved since the year 1965/66 and was written off "utilizing the taxed reserve" in an amount of Lit. 136,500,000.

The account *C. E. Ferrero* showed a balance at 30 September 1965 of Lit. 31,926,701 and increased during the year 1965/66 as a result of withdrawals for bills, with a sole credit for commissions equal to Lit. 19,384,300, giving a balance of Lit. 134,922,116, and was finally closed (at 31 January 1967) using the same ledger card that should have ceased to exist on 30 September 1966.

Mr. Carlo Emanuele Ferrero who, as is known, was the managing director of Fitra S.p.A., also had a similar account, closed at 30 September 1966, showing a balance of Lit. 136,500,000 of which Lit. 121,586,582 was uncollectable (see above) and the remainder, Lit. 14,914,418 was written off at 30 September 1967 "utilizing the taxed reserve".

The identical amounts of the two special accounts of Fitra and Columbus, Lit. 136,500,000, should be noted. These two accounts increased the loss of Raytheon ELSI by Lit. 327,212,698 Ing. Colombo, Lit. 271,422,116 Mr. Ferrero, for a total amount of Lit. 598,634,814.

6. *Analysis of Inventory*

One of the most significant items to examine is the *Inventory* which included thousands of articles and was updated by the IBM computer bureau and could be considered when determining the valuation as a certain hiding place for losses.

We have good reason to believe this in fact, when studying the financial statements from 1965/67 together with the final situation of insolvency at 31 March 1968 in order to compare them with the results effectively calculated by the sworn appraisors nominated by the receivership, and when discarding finally what can or could be salvaged.

The inventories at year end for each of the above years gave the following amounts:

Financial statements at 30 September 1965 — Final inventory	Lit. 5,679,087,465
Financial statements at 30 September 1966 — Final inventory	Lit. 6,202,101,004
Financial statements at 30 September 1967 — Final inventory	Lit. 6,692,156,656
At insolvency date — Final inventory	Lit. 5,519,600,000.

When considering the purchase in the various fiscal years and the sales, the results for the last two years, 30 September 1966 and 30 September 1967, remain constant whilst a large difference of approximately Lit. 1,500,000,000 can be seen in the financial statements at 30 September 1965, a difference which can be described as an overvaluation of inventory.

In fact, if we reclassify the values (rounded to the nearest million) for movements in inventory for the years from 1965 to 1967, we obtain:

Year 1964/65	
— Opening balance	Lit. 5,210,008
— Purchases	Lit. 3,984,695
Total	Lit. 9,194,704

Less: sales in the year	Lit. 8,519,480
Closing balance	Lit. 5,679,087
Gross profit	Lit. 5,003,863
Year 1965/66	
— Opening balance	Lit. 5,679,087
— Purchases	Lit. 5,067,682
Total	Lit. 10,746,769
Less: sales in the year	Lit. 8,242,452
Closing balance	Lit. 6,202,156
Gross profit	Lit. 3,697,838
Year 1966/67	
— Opening balance	Lit. 6,202,156
— Purchases	Lit. 4,230,699
Total value	Lit. 10,432,800
Less: sales for the year	Lit. 7,143,407
Closing balance	Lit. 6,692,156
Gross profit	Lit. 3,402,763

As can be seen from the above, the gross profit, which in the light of an even level of production and raw materials, should have remained constant, in the year 1964/65 (year of the merger Raytheon ELSI/Selit) increased by approximately Lit. 1,500,000,000, from the normal value of Lit. 3,500,000,000 to Lit. 5,000,000,000 as an effect of the over-valuation of inventory effected on that occasion.

As further proof of this, we must also consider the abnormal difference in valuation at the date of insolvency resulting from the appraisal carried out by Prof. Ing. Di Benedetto, who valued the inventory shown in the financial statements at Lit. 5,519,600,000, for an amount of Lit. 2,300,000,000.

Obviously, Professor Di Benedetto's valuation had a lower value as it was valued for liquidation purposes and consequently it cannot be considered as an estimate of the normal production.

In order to convalidate this deduction which cannot in actual fact be proved since there are no elements available (physical stock, detailed analysis of movements, etc.), it can be held that, apart from increases or decreases of a compensating nature each year, inventory was overstated in the financial statements by an amount between Lit. 1,500,000,000 and Lit. 2,000,000,000.

In this respect it is not useful to examine the amounts due to suppliers at the end of each period considered above, since the amount appears insignificant, especially in the last two years, nor would it be useful to consider the amount of bank loans granted against imports, obviously taken to be overseas debts for raw materials; at 30 September 1967 these totalled Lit. 2,447,782,787.

7. *Analysis of Work in Progress for Studies, Research and Development*

At each year-end the internal costs incurred to construct new plant, manufacture own products and for studies, were capitalized, obviously without computing the value of the projects finalized during the year (finished goods) which, instead of increasing the value of "patents, studies, research and development", or the account "plant, machinery and equipment", has confused the value of purchases.

An analysis of the specific accounts for the three years in question shows an annual cost of approximately Lit. 800,000,000 as follows:

Capitalizations during 1965	Lit. 678,409,000
Capitalizations during 1966	Lit. 467,000,000
Capitalizations during 1967	Lit. 372,000,000.

While in the assets, apart from work-in-progress valued at the end of each year in:

1965 — Work in progress for studies, research and development	Lit. 978,364,000
1966 — Work in progress for studies, research and development	Lit. 781,053,000
1967 — Work in progress for studies, research and development	Lit. 441,201,000

there were the following increases in plant, studies, research and development:

During 1965 only for work in progress;
During 1966 the increase related to:

(a) plant and machinery	Lit. 710,000,000
(b) studies, research and development (decrease)	Lit. (230,000,000)
thus the total increase was	Lit. 480,000,000
for which we deduct the work in progress that increased during the year for	Lit. (197,000,000)
we obtain a loss of	Lit. (283,000,000)
During 1967 there was a decrease in the value of plant equal to	Lit. (351,000,000)
and in studies and research costs of	Lit. (126,000,000)
giving a total decrease of	Lit. (477,000,000)
to which we must add work-in-progress that increased during the year	Lit. (330,000,000)
giving a loss of	Lit. (807,000,000)

In conclusion, we have tried to demonstrate that in this sector, even though the company only obtained experience, there was an overall loss in the financial statements between 1965 and 1967 of Lit. 1,090,000,000 (Lit. 283,000,000 + Lit. 807,000,000) which gave rise to the loss of all the assets in this sector, equal to Lit. 2,430,000,000 since they were not realizable.

At this point it must be remembered that the company carried out updating preparation, studies and other work, etc., with an annual cost of approximately Lit. 800,000,000; even though such costs were capitalized annually and amortized in subsequent years, since they did not bear any fruit, they must be considered as a heavy burden on the results of the period.

We still believe it legitimate to question why the company spent so much on studies, research and development (not counting amongst others the high costs for technical consultants) while paying royalties to its holding company which alone should have permitted a well-organized production adopting the production lines laid down by the same. From our investigation we have noted that the Company, after a number of years of production, had still not defined its production lines.

We noted that the main loss resulted in the SCD sector (electronic equipment), revealing it to be a complete failure on which huge amounts had been spent.

Certainly, if the management had had a greater technical rectitude, such large costs in this sector would not have been allowed, apart from the consultancy fees, which, even if not totally incurred for this sector, have resulted excessive when compared with the fact that the overall aim of the company has not been achieved after so many years of activity.

8. Bank Current Accounts and Overdrafts

The origin of the bank overdraft at the insolvency date for an amount of Lit. 12,971,000,000 can be divided into three categories:

(1) overdraft for normal daily use;
(2) amounts advanced from the banks on imported goods (payments to suppliers) and for goods exported (advances to the company against presentation of invoices with customs' stamp);
(3) long and medium-term loans on the company's plant and inventory.

At insolvency date, since the balance on long and medium-term loans amounted to Lit. 3,841,600,000, the difference of Lit. 9,129,400,000 was made up by bank overdrafts and Lit. 1,200,000,000 of bills of exchange payable to banks as they referred to accommodation bills discounted with the banks.

The analysis of the three years shows an increase in the years ended 30 September 1965 (Lit. 1,093,500,000) and 30 September 1966 (Lit. 1,142,000,000) whilst there was a slight decrease for the year ended 30 September 1967 (Lit. 314,000,000) and for the part of the year till insolvency was declared (Lit. 350,000,000).

When examining the overdrafts, we must consider the bank guarantee given by the holding company for an amount up to Lit. 5,090,000,000, excluding the mortgages and other privileges already guaranteeing the loans and overdrafts.

There are grounds for believing that the parent company, which provided assistance to its subsidiary upon remuneration had ample time to realize that the subsidiary's indebtedness was swelling progressively and growing out of all proportion to the volume of production, and we are surprised that the parent company did not see fit to bring the subsidiary within more realistic limits, for which it gave a guarantee of over five billion lire.

9. Final Notes of the Technical Advisor

The investigation was difficult in that explanations from persons who had closely followed the company were not forthcoming, except for certain explanations from Rag. Nicolò Fiandaca, administrative director responsible for the financial sector. On the other hand, the amount of administrative and accounting entries, the complex activity of the company from a technical point of view and owing to the internal and external financial transactions (between group companies, financing by the holding company, etc.), as well as the difficulties of finding filed documents, meant that the investigation could not be carried out in a short period of time; consequently the investigation was limited to a general examination of a number of items for the last three accounting periods (1964/65-31/3/68), concentrating on certain items that I considered to be of major importance.

In this investigation, as well as in the actual tests, I was ably assisted by Prof. Dr. Giuseppe Zarcone, who used his knowledge of the application of modern accounting techniques, as well as of the American accounting systems generally adopted by the company.

Palermo, 20 November 1969.

Dott. Giuseppe MERCADANTE.

Document 37

Sicilian Regional Law No. 12 of 13 May 1968, "Special Benefits for Employees of ELSI of Palermo and SATS of Messina"

[Italian text not reproduced]

(DOC. NO. 4) LAW NO. 12 OF 13 MAY 1968; SPECIAL BENEFITS FOR EMPLOYEES OF EL.SI OF PALERMO AND SATS OF MESSINA

SICILIAN REGION. THE REGIONAL ASSEMBLY HAVING APPROVED, THE PRESIDENT OF THE REGION HEREBY PROMULGATES

the following law

Article 1

The regional councillor for labour and co-operation is hereby authorized to make payment, for the months of March, April and May 1968, to the dismissed employees of Raytheon-EL.SI of Palermo of a special monthly indemnity equal to the actual monthly pay received until the month of February 1968.

The employees dismissed after the month of March shall receive the indemnity as from 1 March 1968.

Article 2

The regional councillor for labour and co-operation is hereby authorized to make payment, starting from 1 April 1968, to the dismissed employees of SATS of Messina of a special monthly indemnity equal to the actual monthly pay received. This indemnity shall be paid until such time as management resumes control and in any case not after 31 May 1968.

Article 3

The indemnity provided for in Articles 1 and 2 above shall be commensurate with the amount of pay actually received on the basis of 26 working days per month.

Article 4

In the implementation of the present law the provisions of regional law No. 334 of 2 August 1954 shall apply.

Article 5

Approval is hereby granted for expenditure of 300 million lire for the purposes laid down in Article 1 above and of 70 million lire for those laid down in Article 2.

The above-mentioned amounts shall be paid into the Sicilian fund for the welfare and employment of jobless workers established in accordance with Regional Presidential Decree No. 25 of 18 April 1951.

Article 6

The expenditure incurred under the present law shall be covered using funds appropriated to section 20911 of the Budget for the financial year 1968.

The present act shall be published in the *Official Gazette* of the Sicilian Region. It is mandatory to respect and enforce it as a law of the Region.

Palermo, 13 May 1968.

(*Signed*) CAROLLO.
Macaluso.

Document 38

Sicilian Regional Law No. 23 of 6 August 1968, "Further Special Benefits for Employees of ELSI of Palermo"

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LAW NO. 23 OF 6 AUGUST 1968 (*OFFICIAL BULLETIN*, NO. 36 OF AUGUST 10)

FURTHER SPECIAL BENEFITS FOR THE EMPLOYEES OF EL.SI OF PALERMO (*OFFICIAL GAZETTE*, NO. 224 OF 3 SEPTEMBER).

The Regional Assembly having approved:

The President of the Region hereby promulgates the following law:

Article 1. Approval is hereby granted for a further expenditure of 350,000,000 lire relative to the period from 1 June to 15 September 1968, for the purposes laid down in Article 1 of law No. 12 (3) of 13 May 1968.

The monthly allowance provided for in Article 1 of the above-mentioned law is also paid to those employees who attended the retraining courses managed by EL.SI on behalf of the Ministry of Labour, as well as to those employees who were put on reserve by Raytheon EL.SI in March 1968 and subsequently dismissed on 30 April 1968.

The sums effectively received by the employees concerned in March 1968 are deducted from the aforesaid indemnity.

Those workers who were employed in another capacity are not entitled to receive such indemnity.

Article 2. The amount under Article 1 shall be paid into the Sicilian fund for the welfare and employment of jobless workers, established in accordance with Regional Presidential Decree No. 25 of 18 April 1951.

Article 3. The expenditure of 350,000,000 lire, incurred under Article 1 of the present law, shall be covered using a quota of the funds appropriated to section 10802 of the budget of the Sicilian Region for the current financial year.

The quota of the appropriation authorized under Article 5, first subparagraph of Law No. 24 of 24 October 1966, concerning the financial year 1968 and utilized in compliance with the foregoing subparagraph, is carried over to the financial year 1983.

The President of the Region is hereby authorized to modify the budget — if necessary — by virtue of his own decree.

Article 4. ESPI is hereby authorized to participate in a company aiming at taking over the property constituting Raytheon EL.SI corporate assets, in order to ensure their utilization for the production purposes inherent to the activity already carried out by the said Raytheon EL.SI.

Article 5. The present act shall be published in the *Official Gazette* of the Sicilian Region and shall come into force on the same day of its publication.

Document 39

SICILIAN REGIONAL LAW NO. 31 OF 23 NOVEMBER 1968, "INTEGRATIVE PROVISIONS TO REGIONAL LAW NO. 23 (2) OF 8 AUGUST 1968 CONCERNING FURTHER SPECIAL BENEFITS FOR EMPLOYEES OF ELSI OF PALERMO"

[Italian text not reproduced]

LAW NO. 31 OF 23 NOVEMBER 1968 (*OFFICIAL BULLETIN*, NO. 53 OF 23 NOVEMBER). PROVISIONS SUPPLEMENTING REGIONAL LAW NO. 23 (2) OF 6 AUGUST 1968, CONCERNING FURTHER SPECIAL BENEFITS FOR EMPLOYEES OF EL.SI OF PALERMO (*OFFICIAL JOURNAL*, NO. 313 OF 10 DECEMBER).

The Regional Assembly having approved; the President of the Region hereby promulgates the following law:

Article 1. Approval is hereby granted for a further expenditure of 230 million lire for the purposes laid down in Law No. 23 of 6 August 1968.

Article 2. The words "relative to the period from 1 June to 15 September 1968" under the first subparagraph of Article 1 of law No. 23 dated 6 August 1968, are replaced by the following ones: "relative to the period from 1 June to 15 October 1968".

Article 3. The expenditure incurred under the present law shall be covered using a quota of the funds appropriated to section 20911 of the budget of the Sicilian Region for the financial year 1968.

In connection with the foregoing subparagraph, Annex No. 4 to the Budget estimate for the financial year 1968 is modified as follows:

Capital expenditures

Section No. 20911. Necessary funds in order to meet expenses, etc.

Object of the provision

Entry to be modified:

Participation of the Sicilian Region in the endowment fund of the Regional Institute for the Financing of Industries in Sicily (IRFIS). From 800 million lire to 570 million lire, entry to be added:

Provisions supplementing regional law No. 23 of 6 August 1968, concerning further special benefits for the employees of EL.SI of Palermo.

230 million lire.

Article 4. The President of the Region is hereby authorized to modify the budget — if necessary — by virtue of his own decrees.

Article 5. The present act shall be published in the *Official Gazette* of the Sicilian Region, and shall come into force on the same day of its publication.

Document 40

REPORT OF THE BANKRUPTCY RECEIVER, AVVOCATO SIRACUSA, 6 MARCH 1970

[Italian text not reproduced]

TO JUDGE VINCENZO BADALAMENTI, "GIUDICE DELEGATO" FOR THE RAYTHEON EL.SI S.P.A. BANKRUPTCY CASE BEFORE THE PALERMO COURT.

I, Attorney Giuseppe Siracusa, trustee in the matter of the afore-mentioned bankruptcy proceedings, further to my earlier report of 28 October 1968 deposited on 31 October 1968 hereby advise you as follows:

The expert witness appointed by you, Dr. Giuseppe Mercadante, submitted his report, duly sworn, on 29 November. In it he stated that the company's statutory accounting records had not been kept in the customary manner, in that the transactions had not been entered in serial form. Under this *modus procedendi*, each transaction entered in the journal was recorded without cross-reference or serial number. According to the expert witness, this was incorrect and serious because, even though the pages in the day book were serial-numbered (albeit without being initialled by the Notary Public who had stamped them for authentication), any transaction could have been fitted into any blank space without showing that it had been unlawfully entered at a later time.

The expert witness also confirmed what I had earlier stated in my first report deposited on 31.10.1968, namely, that the company's accounting records and general accounts had been entered up to 31 December 1967.

The expert witness also referred to the analyses he had made of the company's output and pointed out that this examination had not revealed any sound grounds justifying Raytheon EL.SI. S.p.A.'s losses up to the financial year which ended at 30 September 1967. His analysis of production over the last three-year period, which he conducted in order to identify the causes and the reasons for the company's serious indebtedness, produced widely inconsistent results, particularly with regard to the direct and labour costs as a percentage of the quantities of goods sold. This being so, and in view of the difficulty of carrying out his examination, the expert witness concluded that forged entries had been made in the accounting records. He felt that this was more likely to be the case since the company had practised cost accounting for some years, but not for others.

Bearing this in mind, the expert witness made an analytical examination of the direct costs and overheads, in which he noted a number of inconsistencies and irregularities.

I am submitting his technical report to you so that you can appraise these points, which are dealt with quite thoroughly and explicitly.

As you know, the Raytheon Company was entitled to royalties for the use of its technical processes and patents. The expert witness noted that the Raytheon Company had not only collected these royalties but that it had also received substantial supplementary revenue from what it referred to as "assistance", without any further qualification. These revenues totalled Lire 60,932,000 in 1965, Lire 96,998,000 in 1966, and Lire 104,328,000 in 1967. Raytheon EL.SI also paid out considerable sums for services received from third-party technical consultants: Lire 15,101,000 in 1965, Lire 42,212,000 in 1966, and Lire 66,818,000 in 1967.

For such large fees one might reasonably have expected its products to be virtually perfect from a technical point of view. Yet they continued to be defective, and the customers continued to return them as faulty. The expert witness was unable to find any explanation for this, but his main difficulty was justifying these costs, considering the poor quality of the goods produced.

I therefore feel that good grounds exist for instituting proceedings against the company directors in respect of these expenses, since they were wholly unjustified as far as the results on production were concerned. At all events, I consider that legal action can certainly be taken against the Raytheon Company to recover the money paid to it for assistance, in addition to the revenue from royalties to which it was certainly entitled.

Justification for this opinion stems from the fact that, according to the expert witness, the company carried out updating, preparation and research work totalling an average of Lire 800,000,000 per year, which it capitalized annually to be gradually amortized in future financial years.

However, the consultant noted that since these expenditures did not produce revenue, they should be considered solely as substantial operating losses. This view is supported by the expert witness's contention that it would be quite absurd for a company to incur such huge expenses on research and experimentation, in addition to other huge expenses on technical consultancy, and still produce faulty products. Its products should have been nearly perfect and of high technical quality even if one only considers the assistance accruing from the payment of the royalties. But the expert witness was also puzzled when he analyzed the sales, loans and inventories, as he stated in his report to which I refer you.

The results of the inspection carried out by the expert witness/auditor, assisted by Professor Giuseppe Zarcone, lead me to conclude that the financial difficulties and other company problems were due to a shortage of capital, for which the company took out large loans on which it had to pay considerable service charges, as well as to poor management. The principle cause, however, was the poor organization and mistaken policies of the commercial department, with the result that sales were not properly thought out or financially viable, but were made willy-nilly simply to ensure a high turnover.

However, I must add that nearly all the loans recorded in the financial statements do in fact exist, and that with very few exceptions, all of them can be paid.

For a more thorough examination of all the accounts and the administrative situation of the company, I refer you to Dr. Mercadante's annexed technical report of 20.11.1969.

I am assigning the foregoing to you so that appropriate action can be taken.

Palermo, 6 March 1970.

(*Signed*) Giuseppe SIRACUSA,
Trustee in Bankruptcy.

Document 41

DECISION NO. 5143 OF THE COURT OF CASSATION, I SECTION, 7 OCTOBER 1982

[Italian text not reproduced]

CIVIL SUPREME COURT OF APPEAL, I DIVISION, 7 OCTOBER 1982, NO. 5143 — SANDULLI ACTING AS CHAIRMAN — SANTOSUOSSO ACTING AS DRAFTSMAN — GRIMALDI ACTING AS PROSECUTING ATTORNEY (IN ACCORDANCE WITH THE RULINGS OF THE COURT) — CENTRAL SAVINGS BANK FOR THE SICILIAN PROVINCES (ATTORNEYS FORNARIO AND MANISCALCO BASILE) VERSUS THE MACHLETT LABORATORIES INC. (ATTORNEY CICCOTTI), RAYTHEON COMPANY (ATTORNEYS BISCONTI AND FAZZOLARI) AND THE BANKRUPTCY ESTATE RAYTHEON ELSI S.P.A.

Confirmation of the Appeal filed in Palermo on 29 October 1980
(omission)

COURSE OF THE TRIAL

With decision 7 May 1968, the Court of Palermo declared the bankruptcy of Raytheon ELSI S.p.A. (Elettronica Siciliana). The Vittorio Emanuele Central Savings Bank for the Sicilian Provinces, creditor of the bankrupt company for an amount of approximately L. 645 million, not having paid after the sharing out of the assets, sued the US Raytheon Company and, considering that the defendant owned 99.15 per cent of the holdings, as well as all the holdings of the company the Machlett Laboratories, which owned 0.85 per cent of the remaining shares of the afore-mentioned bankrupt company, requested the Court to declare its unlimited liability as sole partner, under Article 2362 of the Civil Code.

On the initiative of the defendant, a preliminary jurisdiction regulation was inserted, which ended with the decision — on the part of the Supreme Court — to dismiss the appeal. After resuming the case, and having ended all other legal proceedings, the petition was dismissed by the Court of Palermo with decision 7 July 1978; this decision was confirmed also as far as the appeal was concerned.

The Court of Appeal of Palermo, with decision 13 June-29 October 1980, after disagreeing with the principle (Supreme Court of Appeal, 23 March 1971, No. 848) whereby the unlimited liability laid down in Article 2362 could be referring solely to the hypothesis that the only shareholder is a normal individual, ruled that the liability undertaken by a legal person with all his estate, is neither juridically nor economically different from the unlimited liability undertaken by a normal individual.

The Court, though, rejected the thesis of the applicability of the aforesaid rule to the case in which in a limited company there is a plurality of shareholders represented by companies, although owned by a single individual, pointing out that this thesis hinges on the principle, difficult to surmount, of the juridical autonomy of the single companies of the group in the carrying out of their business.

The case envisaged by Article 2362 of the Civil Code, which may not be applied by analogy, applies only when there is a single shareholder, though through a fictitious use of nominees.

From the critical assessment of the various elements pointed out by the appellant bank the Court of Appeal reached the conclusion that the Machlett Laboratories could not be considered merely as a fictitious partner. This was also sufficient in order to rule out the hypothesis that Machlett had merely acted as mandatory for the purchase of the shares. Once established that Machlett was — although in a minimum way — interested in a shareholding in the Italian company, Raytheon Company's wish not to become sole shareholder of the aforesaid Italian company in order to avoid the consequences envisaged in Article 2362, could not be considered fraudulent.

The Court of Palermo also ruled that the behaviour attributed to Raytheon ELSI's directors, being outside the juridical sphere of the US company, might generate its contractual or extra-contractual liability towards the Savings Bank.

Finally, as regards the applicability of US law under Article 12 of the preliminary provisions, the Court ruled that the matter at issue implied a controversy over the juridical subjectivity of US companies. In any case, the Court concluded that,

> "had the US law been applied concerning the partner's liability for the Company's debts — which the Court did not have the possibility to get acquainted with — the result would not have been any different from the one reached by applying Italian law".

For the annulment of this decision, the Savings Bank, being the losing party, files an appeal, accompanied by six motives and illustrated by a memorial. Machlett and Raytheon Company oppose it; the latter has also filed a counter-appeal.

MOTIVES OF THE DECISION

The censures of the six motives for the appeal were subdivided in two groups of issues by the counsel of the appellant. The first one concerns the applicability of Article 2362, Civil Code, while the second one regards fault liability.

In the first group Raytheon's liability is sustained under the afore-mentioned Article 2362 on the basis of a number of motives, which can be summed up as follows:

(a) Coincidence between the concrete case and the case envisaged by law, at least from a substantial point of view, since the "ratio" and the letter of Article 2362 aim at avoiding the limitation of the liability of the partner who has become the sole "owner" of the limited company, although through another subject (first, second and seventh motive of the hearing of the minutes);

(b) the formal separation between the two subjects no longer holds, once it is proved that one of them has acted as mandatory of the other and has been used as a fictitious nominee; that which clearly emerges from the US law (which the Court should have examined and applied) which does not envisage the presence of two subjects in the case of controlled companies (third, fifth and sixth motive);

(c) in the case of common intention on the part of a number of subjects to purchase holdings in order to concentrate them in the hands of a single subject, Article 2362 applies, at least by analogy (fourth motive).

This Court deems that the problems under sub *(a)* and *(c)* are unfounded in law, whereas the motive sub *(b)* cannot be granted, on the grounds of the judge's findings.

This Supreme Court, modifying its previous approach (decision No. 848 of 1971), recognized that the rule contained in Article 2362 of the Civil Code is applicable, not only in the hypothesis of concentrating the shares in the hands of a single partner, but also when this concentration is achieved in a single legal person. (Supreme Court of Appeal, No. 6594 of 1981.)

Now for the first time this Court is faced with the question as to whether the case envisaged in the aforesaid rule applies when a legal person has complete control over the limited company, and owns up to 100 per cent of the companies holding the shares of the former.

To this effect, it is sustained that also in this case the "ratio" of the rule materializes, that is to say — avoiding any measure aimed at limiting the liability of the single "dominus" who owns the company completely.

Nor is this conclusion contradicted by the letter of the law, which does not refer to the formal "entitlement" of the shares, but concerns their substantial "ownership".

This phenomena is expressly envisaged by the legislator in various other cases of intermediation of nominees (Arts. 1471 and 2360 of the Civil Code, Art. 5 of Law No. 216 dated 7 June 1974); in such cases there is an "indirect" ownership, namely, through other subjects, who are formally proprietors. This hypothesis, being valid also when the holdings of a limited company are completely owned by a single legal person, the plurality called for by the law is only apparent, and therefore the principle of unlimited liability laid down in Article 2362 of the Civil Code becomes applicable.

This thesis is very subtly outlined. Indeed, in a number of cases, apart from those indicated by the appellant, there is substantial ownership of the assets, vis-à-vis their formal entitlement. However, it seems to this Court that the problem must be solved along guidelines which are completely opposite to the ones put forward by the bank appellant, in the same way as some fundamental principles of the existing system on commercial law.

Indeed, the sector of limited companies in our legislation is characterized by:

(a) the formal legal personality, who does not allow the various subjects operating in the commercial field to be mixed up, even though they associate or create links between themselves, or are in a position of respective economic dependence;

(b) the principal of autonomy of the estates, which can be referred to the various subjects, even though a single company or group has complete control over the others;

(c) the principle of limitation of liability of the company to its own assets and to the respective shares in the company's capital of individual partners.

The widespread interconnection of the phenomenon of the grouping or of the control relation among companies also hinges on these criteria, where the dependence and accessories among them, as stated on a number of other occasions, does not produce either their identification or the absorption into the juridical sphere of the rights and obligations of the other companies, but limits its effects solely to the field of activity and to the aims to be reached.

The existing law takes into consideration these phenomena, regulating some consequences but without modifying the aforementioned principles on the issue of personality and liability.

Article 2362 of the Civil Code, since it separates, in the case of a single shareholder, the debt situation (Schuld) — which is always borne by the company — and its liability (Hafthung) — which applies to the estate of the single partner — partially waives the aforesaid principles, but retains the juridical autonomy of the various subjects, nor does it contain any elements to consider the absorption in a single shareholder of different partners who have a relationship of economic dependence.

Such regulation waiving the principle of liability envisaged in Articles 2325 and 2427 of the Civil Code, is taken into consideration only for the hypothesis when there is no more plurality of members, not under merely the economic profile, but especially under the juridical one.

In other terms, this regulation does not depend on the case of "complete control" of one of the shareholders as regards assets and management, but on the hypothesis when there is a single shareholder, either formally or for the assessment of a merely fictitious presence of the other shareholders.

Indeed, this Court has — on a number of other occasions — (decis. 2602/70; 571/73) declared that the unlimited liability of the partner under Article 2362 of the Civil Code can only be recognized when there is no longer plurality of partner, through the demonstration of the fictitious or fraudulent nature of the names of the shareholders. Such plurality does not exist, apart from the case of fictitious intermediation of partners nominees, also in the case of purchase of shares through mere mandatories of the only partner.

At this point, three specific complaints of the appellant must be taken into account:

(a) that the various elements proving the fictitious intermediation of the Machlett Company have been assessed by the Court of Appeal only analytically and not globally;

(b) that the evidence that said Company had acted as mandatory has not even been admitted;

(c) that, according to US law, there is no distinction among companies which are associated up to 100 per cent.

The first complaint is unfounded, since the global and conclusive assessment — which runs counter to the appellant's thesis — emerged from the whole thorough analysis carried out by the competent Court regarding the various elements submitted.

The second complaint must be dismissed as well, since the Court of Appeal has logically concluded that — once Machlett's personal interest in purchasing a part, even though very small, of the shares of the Italian company was demonstrated, it was useless to prove a counter-evidence on the basis of this conclusion.

As regards the applicability of the US law, it must be pointed out in the first place that the question raised in the framework of the preliminary jurisdiction regulation as an alternative between the applicability of Article 17 or of Article 25 of the preliminary provisions of the Civil Code, was settled in this latter sense, with a decision of settlement of this Court No. 952 of 1972.

As regards the unicity of juridical subjectivity in the US law for the hypothesis of formally plurimous shareholdings, the Court of Palermo, while pointing out — on the one hand — that it had not had the possibility of getting acquainted with this foreign law concerning the individual States, decided to dismiss the aforementioned thesis on the basis of the information directly acquired by the judge.

As regards the first group of issues raised by the Savings Bank appellant, the unlimited liability envisaged in Article 2362 of the Civil Code materializes only when all the company's shares are in the hands of a single partner, and not when one of the partners has a domineering position as regards management and the effects of said management on the Company's assets, and not even when the holdings of a second (or of other) companies are completely owned by the domineering partner.

The exceptional unlimited liability of the shareholder of a limited company, since it waives the general principle of this matter, may not be applied by analogy.

But the same legislative concrete case materializes both when some shares are purchased by subjects who had acted as simple mandatories and not as partners, and when the plurality of the partners, fictitiously preordained in order to waive the rule of Article 2362, is proved to be only apparent, since these people are basically mere nominees, with no interest or power as regards the life and the activity of the company, therefore cannot be considered as partners.

According to the last thesis supported by the Savings Bank, Raytheon Company's employees, in their capacity as directors of the Italian company Raytheon ELSI, should have been judged guilty for violation of the general principle of correctness and of the principle of the duty of care, with the ensuing liability of the aforesaid US company under Article 2049 of the Civil Code.

This motive must be dismissed as well, since the competent Court has pointed out in this regard that the behaviour of the directors of the Italian company Raytheon ELSI could not be referred to the US company, since there was no evidence that the above-mentioned directors were authorized to commit Raytheon Company.

This statement also implies a concrete assessment, to which no exception may be taken here.

Therefore, the appeal must be totally dismissed, with the consequent granting of the examination of the appeal filed by Raytheon Company.

The Savings Bank — the losing party — must be sentenced to the payment of costs to Raytheon Company, whereas costs must be offset in connection with the Machlett, taking into account the small entity of the respective counsels.

The Supreme Court of Appeal, I Civil Division, joins the appeals Nos. 6481/81 and 7873/81 filed against the first decision; it dismisses the first one and grants the second. It sentences the Savings Bank Vittorio Emanuele, main appellant, to pay the costs, amounting to L. 2,042,000 (of which 2 million lire are for fees), to Raytheon Company. It offsets the costs in respect to the Machlett Laboratories Company.

Rome, 18 June 1982.

The Draftsman,
(Signed) Fernando SANTOSUOSSO.
The President,
(Signed) Ruggiero SANDULLI.
The Division Director,
(Signed) Antonio CHIANESE.

Filed with the Clerk of the Court's office

7 October 1982.

The Clerk,
CHIANESE.

Filed in Rome on 12 October 1982.

No. 27783
(Illegible)

Document 42

DECISION NO. 6712 OF THE COURT OF CASSATION, I SECTION, 9 DECEMBER 1982

[Italian text and English translation not reproduced]

Document 43

DECISION NO. 2879 OF THE COURT OF CASSATION, 9 MAY 1985, *GIURISPRUDENZA COMMERCIALE* (1986), II, PAGES 537-564

[Italian text and English translation not reproduced]

Document 44

AFFIDAVIT OF INGEGNERE BUSACCA, DATED 30 OCTOBER 1987

[Italian text not reproduced]

Maria Antonietta Morici
Notary Public
via Umberto Giordano n. 55
Palermo (Tel. 571059)

1. I am Ing. Guido Busacca, born at Messina on 27.4.37, and resident at No. 35 via Notarbartolo, Palermo.

I graduated in Industrial Engineering — Electrotechnical Subsection — on 13.11.59.

I joined Raytheon-ELSI in via Villagrazia, Palermo, on 1.8.60, and at the time of my dismissal on 29.3.68, I was head of the microwave tube design department.

2. As at 29.3.68 Raytheon-ELSI had five production lines:

(1) Semi-conductors.
(2) X-ray tubes.
(3) Black-and-white cathode ray tubes.
(4) Telephone surge arresters.
(5) Microwave tubes.

The company's technical and economic situation can be described as follows:

Semi-conductor line: the machinery was unserviceable and idle because it had been designed for germanium technology, which had been obsolescent for many years; an attempt was in progress to produce silicon diodes which, although technically valid, had no significant market.

X-ray tube line: the machinery was very old and the processing was carried out at great risk to the operators. The product was quite good but there was no scope for the research required to develop it, for improvement to the plant or for winning a share of the market away from the large electromedical apparatus constructors, who had their own production lines.

The black-and-white cathode-ray tube line involved the majority of the active labour force in operations that ought to have been automated but which were not because black and white consumption was heading for certain decline. The processes were rather uncertain although the quality often happened to be quite good.

The telephone surge arrester line was based on the exploitation of a patent and utilized makeshift equipment and involved high risks, as Cobalt 60 radioactive material was included in the products during processing.

The microwave tube line was based on the market represented by the Hawk missile system and a small research activity had been started up.

3. On the whole, the plant was to be considered uneconomic:

The plant engineering and available technologies were generally obsolete.

The machinery was intensively exploited, old and hard to manage. The labour force was comparatively unskilled. A negligible impulse had been given to independent research and there was no available plan to renew the production lines (even by means of licencing).

4. The dismissal letters arrived in March 1968. We were alllismissed except for a small number of persons required for jobs involving the adnnistrative, commercial and technical aspects of a company ceasing its producve activities. Work had actually ceased some time earlier with the strikes and occpation of the plant.

5. Eltel (set up by SIT-SIEMENS, now called ITALTEL in 1972) took over ELSI. Start-up operations were very difficult. The semi-condctor and X-ray tube lines were not even reopened and the plant was mainly scrapd.

The cathode-ray tube line had to be reactivated in ordeto give jobs to the labour force while awaiting restructuring.

At the time this activity was resumed a licence was purcased from RCA to ensure that the processes were less risky. Also this line was dinantled a couple of years later.

The microwave tube line did not come within the SIT-IEMENS range of (telephone) products and was started up again only experientally, linked with the line surge arresters. A research group was set up and conderable investments made, as a result of which products improved. Other licenes were purchased. Practically all the products were renewed. The line was sol off to SELENIA Industrie Elettroniche Associate S.p.A. in 1985 because of itsgreater affinity with the field of activity of the latter; on the same occasion alsohe telephone surge arrester line was closed down.

The lines set up in the former ELSI plant to replace thoselosed down had no relation to the latter as regards either technology or equipent, for example: telephone cable radio broadcasting, energy stations.

(*Signed*) Guido BUSACCA.

Palermo, 30.10.87.

AUTHENTICATION OF SIGNATURE

I, Dott. Maria Antonietta Morici, Notary Public in Palmo, with office at No. 55 via Umberto Giordano, registered on the List of Ntaries of Palermo, hereby certify that, after being duly warned of the penal consquences of false or incomplete declarations under law No. 15 of 4 January 1968, ig. Guido Busacca, born in Messina on 27 April 1937 and resident at No. 35via Notarbartolo, Palermo, of whose identity I, Notary Public, am certain, madand put his signature to the above declarations.

Palermo, thirtieth of October nineteen eighty-seven.

(*Signed*) Maria Atonietta MORICI.

DOCUMENTS ATTACHED TO THE COUNTER-MEMORIAL OF ITALY

Unnumbered Documents, Volume I

NOTE VERBALE OF THE EMBASSY OF THE UNITED STATES OF AMERICA, ROME, 7 FEBRUARY 1974

No. 51.

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Italian Republic and has the honor to submit herewith the documented claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated.

The documental claim, consisting of five bound volumes in English, includes the sworn statement of claim of Raytheon Company and Machlett Laboratories, Incorporated, two legal memorandums, and 138 annexes in two volumes.

The claim is for $7,225,968, plus interest, from 30 June 1971, and is based upon illegal actions and interferences by Italian authorities contrary to treaty provisions, Italian law, and international law which precluded an orderly liquidation under the laws of Italy of ELSI, S.p.A., a wholly-owned Italian subsidiary of Raytheon Company and Machlett Laboratories located in Palermo, Sicily.

It is established from the evidence that Raytheon Company and Machlett Laboratories, Incorporated, are now and have been continuously nationals of the United States since the date the claim arose on 1 April 1968. The evidence also establishes that ELSI S.p.A., was incorporated under the laws of Italy and was owned at such time 99.16 per cent by Raytheon Company and 0.84 per cent by Machlett Laboratories, Incorporated.

The evidence also establishes that when it became apparent that the extensive efforts of the above-mentioned companies to make ELSI a viable element in the Italian economy would not succeed, ELSI's Board of Directors decided on 16 March 1968 to cease full-scale production, dismiss on 29 March 1968 all but 120 employees and to liquidate in an orderly fashion. As a result of this determination, the Mayor of Palermo, on 1 April 1968, acting in his capacity as an official of the national government, requisitioned the ELSI plant and all equipment for six months. The Mayor's action was appealed by ELSI to the Prefect of Palermo.

The evidence also establishes that ELSI officers and directors, with financial obligations falling due and no assets from which they could be satisfied, were, under Italian law, forced to place ELSI into bankruptcy on 26 April 1968. Under the bankruptcy laws of Italy, ELSI lost complete control of its assets, the most desirable of which were sold to ELTEL, a corporation controlled through IRI, by the Government of Italy. Notwithstanding the illegal requisition and the filing of a voluntary petition in bankruptcy, the Prefect of Palermo failed to act promptly on ELSI's appeal on the illegal requisition. It was not until 20 November 1969, a full year and seven months after the appeal was filed, that the Prefect held that the requisition action of the Mayor was illegal. It was a hollow victory as ELSI was not legally in a position to reassert its control over its property and proceed with its intended orderly liquidation. Based upon the Prefect's decision, the curator in bankruptcy instituted a civil suit against the Mayor and the Interior Ministry of the Italian Republic for damages resulting from the illegal requisitioning. As a result, the Mayor appealed the decision of the Prefect to the President of the Italian Republic who, on 22 April 1972, confirmed the Prefect's finding that the Mayor's action was illegal.

It is clear from the legal opinions submitted with the claim that the appeal taken to the Prefect of Palermo was the only legal remedy available to Raytheon Company and Machlett Laboratories, Incorporated, to obtain redress. It is also clear from the documented claim that amounts realized and to be realized by the curator in the bankruptcy proceedings will not be sufficient to satisfy fully the preferred creditors, to say nothing of the general creditors and the stockholders.

As compared to the skilled personnel ELSI assembled for the orderly liquidation, the curator, even under the best of circumstances, was handicapped in realizing the full value of the property. The curator was further handicapped by the Government's control and eventual purchase of the assets through ELTEL at a reduced price. Moreover, Raytheon Company and Machlett Laboratories, Incorporated, were deprived of their stockholders' rights of liquidating ELSI and of working out favourable settlements with its creditors.

The amount of compensation claimed is based upon the difference between the monetary position in which Raytheon Company and Machlett Laboratories, Incorporated, would have been had they been allowed to proceed with an orderly liquidation of ELSI, as compared to the monetary position they now face.

In addition to the compensation claimed, it is also requested that the Government of Italy arrange to dismiss or settle Italian bank suits against Raytheon Company and Machlett Laboratories, Incorporated, presently pending before the Italian courts, for obligations incurred by ELSI, and which obligations would have been settled during an orderly liquidation but for the illegal actions and interferences of Italian authorities. Accordingly, should Raytheon Company and Machlett Laboratories, Incorporated, be forced to pay judgments of Italian courts, the amount claimed will be increased by the amount of such judgments.

The Embassy of the United States of America is prepared to enter into negotiations with the Ministry of Foreign Affairs of the Government of Italy with a view to concluding an expeditious and equitable settlement of the claim at a mutually convenient time.

The Embassy of the United States of America takes this occasion to renew to the Ministry of Foreign Affairs its expression of highest consideration.

Embassy of the United States of America
Rome, 7 February 1974.

THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED, AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.P.A.

The Government of the United States of America hereby makes claim against the Republic of Italy in the amount of $7,225,968 (Lire 4,516.23 million at the exchange rate of 0.0016) for damages suffered by the American corporate nationals, Raytheon Company and The Machlett Laboratories, Incorporated (hereinafter respectively called "Raytheon" and "Machlett"), as a result of acts and omissions of the Republic of Italy in connection with Raytheon-ELSI S.p.A., their Italian subsidiary (hereinafter in this claim, together with predecessor corporations, called "ELSI").

From the inception of their respective associations with ELSI, which began with the ownership of only a few shares of stock, Raytheon and Machlett on a continuing basis made enormous efforts to increase ELSI's technical and business competence. Essential relationships with Italian firms were sought to unlock Italian markets. However, during its operative existence (1953-1968), ELSI was plagued with problems which prevented it from realizing its potential. During 1967, Raytheon and Machlett made a massive effort to revitalize ELSI by advancing large amounts of new capital, seeking new Italian products, partners and markets, increasing managerial skill and reducing costs. When it became clear in the spring of 1968 that Raytheon's and Machlett's efforts to make ELSI a viable self-sufficient element of the Italian economy were not to meet with success, the claimaints were left with no other solution but the liquidation of ELSI in an orderly and efficient manner. At the point of the decision to liquidate ELSI, the Government of Italy seized ELSI's assets without taking any corresponding responsibility for its liabilities, causing ELSI's bankruptcy, the destruction of a large share of its asset value and substantial losses to Raytheon and Machlett.

The actions of the Government of Italy violated Italian law and the standard of conduct prescribed by customary and conventional international law.

The Statement of Facts on which this claim is based are set forth in this Part I. The legal precedents supporting the position of Raytheon and Machlett regarding the violation of Italian and International law are set forth in Part II. The supporting documents are displayed in the Appendix.

PART I. STATEMENT OF THE FACTS

[Not reproduced]

MEMORANDUM OF LAW IN SUPPORT OF THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED, AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.P.A.

Introduction

In the statement of its claim against the Government of Italy, the Government of the United States has shown that two of its corporate nationals, Raytheon Company and The Machlett Laboratories, Inc., made substantial contributions of "know how" and investment of funds in an Italian corporation, last known as ELSI, S.p.A. Over a 13-year period, Raytheon and Machlett, in addition to their technical contributions, invested over 12,600 million lire in equity and guaranteed loans in the Italian enterprise, without receiving any dividends on their investment.

ELSI's inability to establish itself as a self-sufficient enterprise in the Mezzogiorno stemmed largely from the failure to gain full access to Italian markets. In order to reach such markets, efforts were made to associate with appropriate Italian partners. Assistance was sought from public and private sources. ELSI made efforts to obtain privileges, subsidies, franchises, marketing advantages, and governmental investment enjoyed by other Italian corporations. Although the critical nature of its needs in this regard was graphically portrayed to the governmental officials, ELSI's efforts were largely in vain. Accordingly, in view of its unprofitable operations and inability to achieve measures which would correct its marketing and financial situation, ELSI's American stockholders were left with no alternative to the liquidation of their Italian corporation.

Even at this point, instead of the Government which could have taken constructive action to find a lasting solution to ELSI's problems and thus to preserve the employment base in the Mezzogiorno, instead undertook a series of actions to prevent liquidation.

Belatedly, when it was clear that ELSI had no course open to it other than selling its business and property to the highest bidders, in the best interests of its creditors, the Government of Italy faced the political, social and economic consequences of the liquidation of ELSI, a major enterprise and employer in Sicily. Beset with the results of its own inaction, the Government of Italy then illegally seized ELSI's assets without taking any responsibility for its liabilities, thereby forcing ELSI into bankruptcy and the sale of its assets to a governmental corporation. The management and control of ELSI was taken away from the claimants, and, as a consequence, they suffered great losses.

Among the steps taken by the Government of Italy were:

(*a*) The Mayor of Palermo, acting as an official of the national government, seized ELSI's assets. Such interference at this point wrested the control and management of ELSI from the claimants, plunged ELSI into bankruptcy and deprived them of their interests in ELSI's management and property, permanently. No compensation has ever been paid or even offered the claimants for the taking of their property and management interests in ELSI.

(*b*) The Prefect to whom ELSI promptly appealed, failed to rule on ELSI's appeal for over one and one-half years following the taking by the Mayor of Palermo.

(*c*) The President of Sicily announced the Government's opposition to the sale of ELSI assets and threatened Raytheon and ELSI with prolonged and extensive international litigation.

(*d*) The Italian Government publicly announced that a Government-owned corporation, IRI-STET, would "take over" ELSI, thereby preventing other competing buyers from attempting to purchase the assets.

(*e*) The Italian Government allowed the ELSI workers to occupy the ELSI plant illegally further cutting off any sale possibilities.

(*f*) Banks owned by the Government through IRI, as predicted by President Carollo, initiated lawsuits now totalling Lire 4,400 million against Raytheon and Machlett for unguaranteed loans which the banks had made to ELSI.

In the following pages, the Government of the United States will show that the actions of the Government of Italy were in clear violation of applicable treaty provisions and of customary international law. The Government of the United States will further show legal justification for the amount of $7,225,968 or 4,516.23 million lire at the conversion rate of 0.0016 for the damages suffered by the claimants as a result of the acts and omissions of the Government of Italy.

I. The Community of Interests of the Governments of Italy and the United States in the Equitable Resolution of this Claim

At the outset, it is essential to recognize that the Governments of Italy and the United States enjoy a similar understanding of the necessity, through international law, to protect international investments. Although demonstrated in a number of ways over the years, the most concise manifestation of this understanding is found in their bilateral Treaty of Friendship, Commerce and Navigation and a Supplemental Treaty, which respectively entered into force on 26 July 1949; and 2 March 1961 (hereinafter sometimes called the "FNC Treaty")[1].

Among the provisions of the FNC Treaty are the following which are directly applicable to this claim:

1. Recognition that protection encourages foreign investment to the mutual benefit of both countries[2].

2. Authorization for citizens of either State to "organize, control and manage corporations" in the territory of the other "for engaging in commercial, manufacturing processing and scientific activities"[3].

3. A prohibition against the taking of property of the corporation of one signatory may not be taken within the territories of the other without due process of law and without the prompt payment of just and effective compensation[4].

4. Interests held directly or indirectly by corporations of either signatory in property within the territories of the other are afforded the protection of Article V, paragraph 2, of the FNC Treaty, the pertinent substantive portion of which is set forth in the preceding paragraph 3[5].

5. A prohibition against either signatory taking arbitrary or discriminatory measures within its territories in:

(a) preventing the corporations of the other signatory to control and manage enterprises which such corporations have been permitted to establish or acquire in its territories, or,

(b) impairing such corporations' legally acquired rights and interests in such enterprises or in the investments they have made, whether from the investment of funds through loans, the acquisition of shares of stock or otherwise, or from the furnishing of materials, equipment, services, processes, patents, techniques or otherwise[6].

6. Provision for the rights of the corporations of one signatory to acquire and freely *dispose* of real and personal property in the territories of the other[7].

7. The requirement that each signatory afford the property of corporations of the other "the most constant protection and security" and right to "enjoy in this respect the full protection and security required by international law"[8].

8. A prohibition against unlawful entry or molesting of the dwellings, warehouses, factories, shops, and other places of business, and all premises thereto

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[1] Treaty of Friendship, Commerce and Navigation. 79 *UNTS* 171; 64 Stat. 2255. Agreement Supplementing the Treaty of Friendship, Commerce and Navigation. 404 *UNTS* 326; 12 *UST* 131.

[2] Preamble to the 1961 Supplement to the FNC Treaty.

[3] FNC Treaty, Art. III, para. 2.

[4] *Ibid.*, Art. V, para. 2.

[5] FNC Treaty Protocol, para. 1.

[6] FNC Treaty Supplement, Art. I.

[7] FNC Treaty, Art. VII, para. 1.

[8] *Ibid.*, Art. V, para. 1.

appertaining, of corporations of either signatory, located in the territories of the other[1].

9. Assurance that the rights and privileges of an economic nature granted by one signatory to its publicly owned or controlled enterprises will be extended to the privately owned enterprises of the other where both such enterprises are in competition with each other. Supplying goods or services for government use is excluded, but supplying goods and services for the use of government-controlled corporations is not[2].

10. A requirement that existing and future legislation providing special advantages to firms engaging in the industrialization of Southern Italy is specifically to apply to US investments made in Italy[3].

This claim should be considered in the spirit of the FNC Treaty which reflects the attitudes of both Governments toward international investment, and the desirability of protecting and encouraging it. Not only does the FNC Treaty prescribe the spirit in which this claim should be considered; it, moreover, as shown by the foregoing list, provides many detailed rules on which the claim is based. It also enunciates the Governments' adherence to affording international investment the "full protection and security of international law"[4].

II. The Supremacy of International Law

The rights and duties between States and foreign nationals are established by international law which, in the context of this claim, is superior to domestic law.

The Italian Constitution of 1948, like the constitutions of many States, provides in Article 10:

> "The Italian juridical system conforms to the generally recognized principles of international law.
>
> The juridical status of the foreigner is regulated by law in conformity with international rules and treaties . . .[5]"

The Harvard Draft on the Law of Responsibility of States sets forth this universally recognized rule as follows:

> "Art. 2. The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its National Courts, or in its agreements with aliens, to the contrary notwithstanding[6]."

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[1] FNC Treaty, Art. VI.

[2] *Ibid.*, Protocol, para. 2.

[3] FNC Treaty Supplement, Art. V.

[4] Although the sources of international law are variously defined, Article 38 of the Statute of the International Court of Justice provides a good key.

> Article 38. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> *(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> *(b)* international custom, as evidence of a general practice accepted as law;
> *(c)* the general principles of law recognized by civilized nations;
> *(d)* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
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> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

[5] Peaslee II, 280, a translation.

[6] See comment, 23 *AJIL* (1929), Spec. Suppl., 142-145, for citations.

In its draft on the Law of Treaties, the Harvard Research, with a wealth of citations, unequivocally applies the rule to Treaties as follows:

> "Art. 23. Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system[1]."

Citations of authority for this generally recognized rule are limited in this brief because of their abundance rather than their paucity. The rule is set forth in numerous decisions of international courts[2]. It has been accepted without challenge in the respective practices of the Governments of Italy and the United States. It needs no further elaboration.

III. Acts and Omissions of the Government of Italy in Contravention of Customary and Conventional International Law

A. The Taking of ELSI's Property

As shown in detail in the statement of claim, the illegal requisition of ELSI's property occurred at a crucial time in ELSI's existence. The requisition and the failure of the Italian judicial system to act promptly on ELSI's appeal of the illegal requisition plummeted the company into bankruptcy. It permanently deprived the claimants of their right to manage the corporation and of their interests in the ELSI property. As described in the claim, governmental officials thwarted the sale of the desirable portions of the ELSI property to anyone else, and fostered its sale to a government-owned and controlled corporation. The result in the final analysis is akin to confiscation.

The illegal nature of the taking is, moreover, established by its violation of applicable treaty provisions, general rules of customary international law, and of domestic Italian law.

1. Preventing the Effective Control and Management of ELSI

Raytheon and Machlett were assured the right to pursue directly or through an Italian subsidiary, without interference or discrimination, the manufacturing and scientific activities in which ELSI was engaged. Such rights were provided by Article I, paragraph 2; Article II, paragraph 3; and Article III of the FNC Treaty.

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[1] 29 *AJIL* (1935), Supp., 1029-1044.

[2] The Permanent Court of International Justice, on numerous occasions, maintained that since the rights and obligations of a State in its international relations are determined by international law, it is international law, not municipal law which provides the standards to determine the legality of its conduct. For example, it held in the case concerning *Certain German Interests in Polish Upper Silesia* (Merits), *P.C.I.J., Ser. A, No. 7* (1926), that use of Polish law in expropriating certain German properties in Poland was a violation of Poland's treaty obligations towards Germany. The Court stated, "Any [Polish] measure affecting the property, rights and interests of German subjects covered by Head III of the Convention . . . which oversteps the limits set by the generally accepted principles of international law, is, therefore, incompatible with the régime established under the convention".

See also *Free Zones* case between France and Switzerland, where the Court said "that France cannot rely on her own legislation to limit the scope of her international obligations". *P.C.I.J., Ser. A, No. 24* (1930), 12 and *Ser. A/B, No. 46* (1932), 167.

Article I of the FNC Treaty Supplement, moreover, granted the right to effectively manage and control ELSI. The full text of this significant Article provides:

> "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: *(a)* preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, *(b)* impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development."

The requisition of the ELSI property and the subsequent events, which were foreseeably and proximately caused by the seizure, clearly violated the claimant's right to effective management and control of ELSI. In fact, they prevented *any* management or control by the claimants whatever. The seizure of ELSI's assets at the fragile moment of 1 April 1968, forced ELSI's bankruptcy and assured the eventual sale of its valuable assets to a corporation owned and controlled by the Government of Italy. ELSI's control and management were permanently wrested from the US national claimants. A clear breach of this treaty provision resulted.

2. Impairment of Legally Acquired Rights and Interests

Under sub part *(b)* of the treaty provision quoted in the preceding paragraph, the Government of Italy bound itself not to impair the claimants' legally acquired *rights and interests* in enterprises which they have been permitted to establish or acquire or in investments which they have made. The requisition of ELSI's property at the crucial point in its financial history of 1 April 1968, impaired the enterprise ELSI and the claimants' investment in it to the point of extinction. Again, a clear-cut, far-reaching and irreparable breach of this treaty provision resulted.

3. The Protection of Rights and Interests

Before leaving the provisions of Article I of the FNC Treaty Supplement, attention should be focused upon the fact that the provision clearly establishes the right to protection of property in which they have indirect interests. Also eliminated is the possibility of narrowly defining "interests" so as to eliminate some of the claimants' real damage. Although there are excellent grounds for this claim, based upon customary international law which are set forth below in this brief, Article I of the FNC Supplement eliminates the question of whether the claimants may bring a claim based upon their shareholder and other interests in ELSI. Funds advanced, whether by loan, capitalization or recapitalization "or otherwise" are recognized as protectable under the Treaty.

The provision also recognizes that rights, interests or investment in enterprises may be created by advancing items other than money. Investment may be made in the form of "materials, equipment, services, processes, patents, techniques or otherwise". Again, the Treaty recognizes the many ways in business practice that investment rights or interests in a foreign enterprise are created, and the two

Governments wisely and equitably provide protection for all types of rights, interests, and investments, including the interests of a parent corporation which has invested in its subsidiary by providing it materials, equipment and services for which it has not been paid.

4. Taking Without Due Process of Law and Without Prompt Payment of Just and Effective Compensation

Among the rights of members of the community of nations is the right to protection by international law of the persons and property of their nationals within the territories of other States.

The taking of ELSI's property without payment of prompt, adequate and effective compensation was in violation of Treaty provisions, customary international law, and the domestic law of Italy.

Private property may not be taken from a foreigner without the prompt payment of just, adequate and effective compensation[1].

(a) Taking

The requisition of ELSI's property constituted a "taking" even without the subsequent consequences which deprived the claimants of their property rights and interests permanently. A "taking" may be either temporary or permanent. Accordingly, although the requisition decree purported to seize the property for a six-month period, subject to extension if deemed necessary, it constituted a "taking" *ab initio*, as the term "taking" is interpreted and understood in international law.

Article 10 of the 1961 Harvard Draft Convention on Responsibility of States for Injuries to Aliens defines a "taking" as:

> "3. *(a)* A 'taking of property' includes not only an outright taking of property but also any such *unreasonable interference with the use, enjoyment, or disposal of property* as to justify the inference that the owner thereof *will not be able to use, enjoy, or dispose of the property within a reasonable period of time* after the inception of such interference.
>
> *(b)* A 'taking of the use of the property' includes not only an outright taking of use but also any *unreasonable interference with the use or enjoyment of property for a limited period of time*[2]." (Emphasis added.)

The Mayor's act of requisitioning ELSI's property and the Prefect's subsequent delay in ruling on ELSI's appeal amounted to a "taking" of ELSI's property. Under principles enunciated in the above provision of the Harvard draft, it is clear that interference with ELSI's property insured that ELSI would not be able to use or dispose of its property within a reasonable time. Considering the circumstances surrounding ELSI at the time, the requisition insured that ELSI would never be able to liquidate in an orderly fashion and in effect forced ELSI into bankruptcy. This conduct certainly satisfies the test of "conduct attributable to a State that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property"[1].

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[1] Battaglini, "Nazionalizzazione", *Novissimo Digesto Italiano* XI, p. 150; De Nova, "L'Esproprio in Diritto Internazionale", *Il Politico*, 1951, p. 261; Quadri, *La Sudditanza nel Diritto Internazionale*, Padova, 1936, p. 225; Vitta, "Espropriazione e Nazionalizzazione nel Diritto Internazionale", *Rivista di Diritto Internazionale*, 1953, p. 120.

[2] Art. 10, para. 3, draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, Apr. 15, 1961. Reporters, Sohn and Baxter, Harvard Law School, p. 101; 55 *Am. J. Int'l L.* (1961), 553.

As clearly demonstrated in the Statement of Claim, the Government of Italy was well aware of ELSI's financial straits. It was precisely for this reason (to prevent the consequent orderly liquidation) that the Government requisitioned ELSI's property. Thus, the intent to take the property from ELSI permanently and the effect of such an actual taking are both present in this case. Had the Government of Italy requisitioned the assets of a company which was not in the process of liquidation, had the Prefect promptly overturned the decree, and had the company suffered no substantial interference with its activities, or damage as a result, a requisition might not constitute a "taking" of property. In ELSI's situation, the facts clearly show that the requisition did amount to a "taking of property". Even the loss of title did predictably ensue when a major portion of ELSI's assets were sold by the Curator in bankruptcy to an Italian Government corporation. The fact that the requisition was theoretically only for a temporary period did not change the effect on ELSI — the immediate and permanent deprivation of its use of its property and subsequent loss of legal title.

Thus, having established that the requisition by the Government of Italy substantially exceeded the minimum requirements of the international law to constitute a "taking" of ELSI's property, we turn to the question of whether just compensation was either offered or paid.

The Government of Italy did neither.

(b) The Prohibition against taking Property Rights and Interests Without Due Process or Without Payment of Prompt, Adequate and Effective Compensation

The first sentence of paragraph 2 of Article V of the FNC Treaty provides:

> "The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without prompt payment of just and effective compensation."

Paragraph 1 of the Protocol to the Treaty makes clear that the above provision applies to Raytheon's and Machlett's stockholder and other interests in ELSI and the ELSI property. It provides:

> "1. The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

Again, the two Governments, in order to encourage foreign investment and the benefits which flow therefrom, have eliminated the technical distinction between rights and interests in property. The Treaty safeguards both the rights and interests in property held directly or indirectly. Raytheon and Machlett invested in ELSI over 12,000 million lire in the manner contemplated by this Treaty, and accordingly their property rights and interests held indirectly through ELSI were afforded protection from the taking of such rights and interests without due process of law and without the prompt payment of just and effective compensation. The taking of such rights and interests of the claimants without due process of law and without prompt payment of just and effective compensation constitutes a clear treaty violation by the Government of Italy.

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[1] Art. 10, para. 3, draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, Apr. 15, 1961. Reporters, Sohn and Baxter, Harvard Law School, p. 101; 55 *Am. J. Int'l L.* (1961), 553.

Moreover, the constitutions of almost all countries of the free world prohibit the taking of private property without payment of compensation. The Constitution of Italy is no exception. Article 42 of the Italian Constitution provides:

> "Property is public or private. Economic assets belong to the State, to institutions or to private persons.
>
> Private property is recognized and guaranteed by law, which specifies the modes of acquisition and enjoyment thereof, as well as its limits, in order to assure its social function and render it accessible to all.
>
> In cases provided by law, *and on the basis of compensation*, private property may be expropriated for reasons of public interest." (Emphasis added.)

The US law is like that of Italy in this respect. The fifth amendment of the US Constitution affords protection to private property and just compensation when it is taken for public use. The applicable portion of this amendment provides:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The requisition of the ELSI property was illegal under Italian law. It was also held to be so by a favourable ruling on the appeal of ELSI[1].

Italian courts have taken a similar position with respect to the effect in Italy of a foreign nationalization where full compensation is not guaranteed. For example, a 1956 decision of the Court of Appeal of Bologna reached this result in the case of *Svit Nsrodin Padnik and Bata A.S.* v. *Societa B.S.F. Stiftung and others*. The Court nullified the extra-territorial validity in Italy of an expropriation by the Czechoslovak Government where payment and valuation would be solely at the discretion of the expropriating administrative authority in Czechoslovakia. The case held that under such circumstances proper standards were not established which would protect an owner from political and other discrimination and would thus reduce the expropriation to an act of "real and pure confiscation". The court took the effective measure of holding that nationalization under conditions of this type would not "produce" a transfer of ownership of property situated in Italy[2].

The taking of the ELSI property was without due process in further violation of the Treaty provisions of Italy and the United States. The taking runs counter to court decisions handed down by the Courts of Italy. It contravenes the provision of the Italian Constitution set forth above. It even has been declared illegal by the Prefect in the appeal taken by ELSI.

The taking also is contrary to the generally accepted principles of customary international law. In the *Cerruti* case[3], the Government of Italy espoused the claim of its national against the Government of Colombia. The latter had taken properties of a Colombian company in which an Italian national held substantial interests. The Government of Italy vigorously pursued compensation for the value of Cerruti's interests for many years. Eventually, the matter was arbitrated by the President of the United States, and Italy was given an award for the value of such interests plus protection of its national against the monetary consequences of suits against him in process at the time of award which arose in connection with the taking of his property interests in Colombia.

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[1] See Exhibits III-7 and III-8 for the text of the appeal of ELSI and the decision of the Prefect one and one-half years later.

[2] Reported in 5 *American Journal of Comparative Law* 641, 642 (1956).

[3] De Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, pp. 630-631; IV *AJIL* 1003 et seq.

Accordingly, without prompt payment of just and effective compensation in the taking of the ELSI property, the Government of Italy breached a principle of international law, to which it has consistently subscribed.

A large number of western countries, by treaty, have assured the protection of private property. As demonstrated above by the FNC Treaty, Italy and the United States number among the States which have given such assurances. In so doing, they lend stability to the rules regulating investment, and in this way enhance their economic development in their own interest. These treaties encourage the "investor" to allow his funds, technology and managerial skills to flow to areas where they are most needed in order to energize less developed areas. Often the missing ingredient to the fulfilment of a depressed area is required from abroad. Sometimes this ingredient is capital, sometimes techology, and sometimes managerial skill. These treaties encourage the mix of local natural resources and manpower with the foreign ingredient required in order to achieve mutually beneficial results.

Another such treaty provision is found in the protocol to the European Convention for the Protection of Human Rights. This protocol was signed by a representative of Italy on 20 March 1952 in Paris and ratified by the Government of Italy on 26 October 1955. It provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest, and subject to the conditions provided for by law and by the general principles of international law."

The following is an illuminating official comment explaining the meaning of this provision:

> "This text permits the expropriation of private property 'subject to the conditions provided for by law', which will, in the great majority of cases, include the payment of compensation. In addition, a further guarantee is added by the reference to 'the general principles of international law'. This provision was intended to guarantee compensation to foreigners for the expropriation of their property, even if compensation is not paid to nationals; it would therefore make it impossible for a State which nationalizes foreign property without adequate compensation to justify its actions on the ground that the foreign owners of the property were treated on a footing of equality with its own citizens[1]."

Clearly, compensation is to be paid to the foreigner, even though nationals might not receive compensation or might not be paid as much as foreigners. It is also clear from use of the term "legal person" in the text of the protocol that it affords protection to corporations.

In this regard Italy's position is the same as that of the United States; Italy has also taken additional steps to assure that foreign investors and property owners will receive equitable treatment in the territory of Italy, which is what the claimants seek in presentation of this claim.

Accordingly, the Government of Italy is responsible for making payment in respect of its taking of the ELSI assets in contravention of customary and conventional international law and in contravention of the law of most nations, including its own.

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[1] Robertson, *The Council of Europe*, p. 158.

B. Occupation of ELSI's Plant

As set forth in the Statement of the Claim, hundreds of ELSI workers forcefully occupied the ELSI plant.

The holding of the plant by the workers is illegal under Italian law. Articles 508, 633 and 634 of the Italian Criminal Code clearly cover almost all foreseeable fact situations in which private property is affected or perturbed by the violent action of others.

Holding of the ELSI plant by the workers was illegal under some or all the above-mentioned Articles of the Italian Criminal Code. Translations of which are as follows:

> "508[1]. (Arbitrary invasion or occupation of agricultural or industrial factories. Sabotage.)
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> Whoever invades or occupies someone else's agricultural or industrial factory . . .. with the only purpose of preventing or perturbing the normal cause of work, is punished by imprisonment of up to three years and by a fine of not less than Lire one-thousand (now Lire eight-thousand)."
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> "633[2]. (Invasion of lands or buildings.) Whoever arbitrarily invades someone else's lands or buildings, either public or private, for the purpose of occupying them or to otherwise draw profit from them, is punished, upon demand of the private offended person, by imprisonment of up to two years or by a fine from Lire one-thousand to ten-thousand (now from Lire eight-thousand to eighty-thousand).
>
> The above punishments are inflicted jointly and the action is started by the Office of the District Attorney without demand if the crime is committed by more than five persons, one of whom is armed, *or by more than ten persons, even without weapons.*" (Emphasis added.)
>
> "634[2]. (Violent perturbation of the possession of immovables.) Outside the cases indicated in the preceding Article, whoever by violence to persons or by threat perturbs someone else's peaceful possession of immovables, is punished by imprisonment of up to two years and by a fine from Lire one-thousand to three-thousand (now Lire eight-thousand to twenty-four thousand).
>
> The violation is considered as having been committed by violence or threat when it is committed by more than ten persons."

Under the laws of any civil law country, including the Italian law, when the authorities have knowledge that a crime is being committed such authorities must intervene immediately to stop the criminal action and to prosecute the offenders. Articles 1 and 2 of the Italian Code of Criminal Procedure provide:

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[1] Section 508 of the Italian Criminal Code (approved by Royal Decree No. 1398 of 19 October 1930), which falls under the following headings:

"Book 2. The Crimes in Particular, Title 8, Crimes Against the Public Economy, Industry and Trade, Chapter 1, Crimes Against the Public Economy."

[2] Which falls under the following headings:

"Title 13. The Crimes Against the Property, Chapter 1, Crimes Against the Property Committed by Using Violence Against Things or Persons."

"1[1]. (Officiality of the penal action.) The penal action is public and, when the private demand for punishment ('querela'), the request by the Minister of Justice ('richiesta') or the private petition ('istanza') are not necessary, (the action) is started by the Office of the District Attorney in consequence of a report ('rapporto') (made by the Police or by other Public Officials), medical ('referto'), private information ('dununcia') or of any other information of the crime.

2. (Duty to report in general.) The Officials and the other members of the Judiciary Police must make a report of any crime of which they have in any way knowledge except for those crimes for which punishment can be inflicted only upon private demand ('querela') of the offended person.

The other public officials and those persons who are appointed to carry out a public service, who, in exercising their functions or service or as a consequence of their functions or service, have knowledge of a crime, are obliged to make a report on it provided it is not a crime for which punishment can be inflicted (only) upon demand of the offended private person.

The report must be filed, without delay, to the office of the District Attorney or to the 'Pretore'.

The report summarizes the fact and all circumstances which may be of interest for the criminal proceedings; gives information concerning all the evidence collected and, when possible, contains the personal data regarding the person who is indicated as being the author of the crime, the person offended by the crime and the witness of any element suitable for the identification of same."

Despite their obligations under the law, Italian officials, instead of taking the measures required by Italian law and removing the workers, seized the plant by the Mayor's illegal requisition order. The ELSI officers were denied access to the books and records of the Corporation. Prospective buyers could not view the plant, its equipment and inventory. The acts and omission of the governmental Officials foreclosed the possibility of any sale of the ELSI assets and of an orderly liquidation.

The FNC Treaty also affords protection to the claimants in this connection. In pertinent part, it provides:

> "The dwellings, warehouses, factories, shops, and other places of business, and all premises thereto appertaining, of the nationals, corporations and associations of either High Contracting Party, located in the territories of the other High Contracting Party, shall not be subject to unlawful entry or molestation[2]."

C. *Failure of Prefect Promptly to Quash the Requisition*

In the circumstances, the failure of the Prefect immediately to act upon the ELSI appeal was contrary to Italian and international law. In order to avoid the damage done to the claimants by virtue of the requisition of the ELSI assets by the Government of Italy, the Prefect should have taken immediate action on the appeal. This appeal was not acted upon within a few hours, days, weeks or even months. Over a year and a half elapsed before a decision was rendered. In the interim, ELSI had been destroyed, forced into bankruptcy, and its property values decimated. This is a perfect example of the maxim:

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[1] Section 1 of the Italian Code of Penal Procedure — approved by Royal Decree No. 1399 of 19 October 1930, which falls under the following headings: "Book 1, General Provisions, Title 1, The Actions, The Penal Action."

[2] FNC Treaty, Art. III, para. 2; Art. V, para. 3.

"Justice delayed is justice denied."

International jurisprudence is replete with cases which recognize the validity of this axiom[1].

As a prelude to the foregoing, the claimants were threatened with such a delay and with the irreparable consequences. The Hon. Carollo recognized that irreparable damage would befall the claimants if the requisition was not lifted. He stated orally and in writing that he deemed it his "duty, in the situation as it has developed, to provide *Raytheon Company* with some fundamental elements of judgment so that the *irreparable* can be avoided"[2]. With reference to the appeal which should have been decided without delay in view of the critical nature of ELSI's position, the Hon. Carollo stated in his written memorandum to the President of ELSI:

> "(2) The Banks which have outstanding credits for approximately 16 billion lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level. I mean to refer to Raytheon and not to ELSI because the distinction between ELSI and Raytheon is not found to be admissible since any and all financing was granted to ELSI based on the moral guarantee of Raytheon, whose executives have always negotiated said financing.
>
> (3) Anyway, it is known in Italy that one can enforce the claims directly against Raytheon because it has interest and revenues in our country also outside ELSI.
>
> It is obvious that every attempt will be made *(even at the cost of long litigation)* to obtain from Raytheon what is owed by ELSI.
>
> (4) In the event that the plant shall be kept closed, waiting for Italian buyers who will never materialize, *the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by*[3]." (Emphasis supplied.)

These threats of delay in connection with the illegal requisition, the fact they were carried out by the failure of the Prefect to rule for over one and one-half years, the forced bankruptcy of ELSI and the dragging of the claimants into international litigation by the government-owned and controlled banks violates customary international law and the provisions of Article V, paragraph 1, of the FNC Treaty, which provides:

> "The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law."

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[1] For a wealth of citations, see Freeman, *Denial of Justice*, Chapter X — Unreasonable Delay in Administering Justice; the Hague Codification Conference of 1930: "Article 9. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact . . . (2) that, in a manner incompatible with said obligations, the foreigner has encountered in the [judicial] proceedings unjustifiable obstacles *or delays* implying a refusal to do justice." The Harvard Draft Research on Responsibility of States in the pertinent part of Article 9 provides: "Denial of Justice exists when there is an unwarranted delay . . ."

[2] Exhibit III-12.

[3] *Id.*

The fact that all similar other requisitions of property under the 1865 Italian statute had been promptly quashed by Italian authorities violates Article V, paragraph 3, of the FNC Treaty, which affords the claimants protection from such discriminatory conduct as follows:

> "3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, *no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party* and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country. *Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest shall be accorded,* within the territories of the other High Contracting Party, treatment no less favorable than that which *is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest,* and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest." (Emphasis supplied.)

Accordingly, protection is afforded to Raytheon and Machlett, by both customary and conventional international law. It is clear with respect to the latter that this protection extends to Machlett and Raytheon who, as shareholders, had a "substantial interest" in ELSI, their wholly owned Italian subsidiary, as contemplated by the Treaty provision quoted immediately above.

Failure of the Prefect promptly to quash the illegal requisition violated the above-mentioned Treaty provisions as well as customary international law. It damaged the claimants for which the Government of Italy should compensate the Government of the United States.

D. Failure to Achieve Access to Markets and Advantages of Mezzogiorno Laws

During its existence, ELSI sought but did not receive, market parity with publicly owned and controlled electronics enterprises in connection with the supplying of goods and services for use by Italian government-controlled corporations. Failing to achieve such parity, it then sought to associate itself with government-controlled corporations in order to obtain a share of such markets. ELSI also sought, without success, the advantages accorded by Italian law to firms in Southern Italy. Access to such markets and the benefits of such laws are assured by the FNC Treaty.

E. Interference with ELSI's Right to Freely Dispose of Real and Personal Property

Article VII of the FNC assures the claimants the rights to freely dispose of their real and personal property within the territory of Italy. The acts and omissions of the Government of Italy prevented them from disposing of their interests in ELSI's real and personal property. In fact, the entire object of the requisition and subsequent actions of the governmental officials was to interfere with the disposal of the ELSI assets in accordance with the planned orderly liquidation. The interference is set forth in detail in the statement of the claim. The President of Sicily made clear the intent that such interference would persist, blocking sale of the assets to anyone in order to assure that they would not be removed from Palermo.

Here, again, is a clear Treaty violation for which the Government of Italy is liable.

IV. Responsibility of the Government of Italy for the Acts and Omissions of Its Officials

Acts and omissions of officials within the actual or apparent scope of their official capacities are attributable to their government. The acts and omissions of the President of the Sicilian Region, the Mayor of Palermo, the Prefect of Palermo and others which were described in Part I of this claim, are directly attributable to the Government of Italy. As a result, the Government of Italy is directly responsible for such acts and omissions, and the damage which resulted from them.

The rule regarding attribution of acts and omissions of government officials to the government is generally accepted as customary international law. There can be no doubt "that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the government, so far as the acts are done in their official capacity"[1].

> "The organs of the State acting within their competence may commit internationally unlawful acts thereby resulting in the responsibility of the State . . . The only check which is necessary in this connection is the one concerning the possibility that the organ acted outside its competence. When it has been ascertained that an action falls within the competence of the organ, responsibility for such an action is imputed to the State[2]."

Inter alia, the acts and omissions of the judiciary[3], of administrative officials[4] and of officials of municipal and subordinate units[5] are imputed to the State.

The American Law Institute has stated the rules as to attribution as follows:

> "Section 169. *General Rule as to Attribution*
>
> Conduct of any organ or other agency of a state, or of any official, employee, or other individual agent of the state or of such agency, that causes injury to an alien, is attributable to the state within the meaning of section 164 (1) if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.
>
> *Comment:*
>
> (a) *State agency, in general.* The term 'agency' as used in this Section includes the head of state and any legislative, executive, administrative or judicial organ, or other authority of the state.

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[1] Salvador Commercial Company (El Triunfo), XV *Reports of International Arbitral Awards* 477 (1902).

[2] Monaco, *Manuale di Diritto Internazionale Pubblico*, Turin, 1970, p. 556.

[3] *Id.*, pp. 558-560.

[4] *Id.*, pp. 557-558.

[5] *Id.*, pp. 560-562; see also Monaco, *Manuale di Diritto Internazionale Publico*, Turin, 1960, pp. 560-562.

> (b) *Commercial enterprise*. The term 'agency' as used in this Section includes any commercial enterprise owned by a state unless, under the law of the state, such enterprise is a separate legal entity to which the state does not accord sovereign immunity of a foreign state in the courts of other states . . .
>
> (c) *Individual agent*. The term 'individual agent' as used in this section includes any official employee, member of the armed forces, or other individual employed by or authorized to act on behalf of the state or any agency of the state . . .
>
> Section 170. *Conduct of Local Authorities*
>
> If conduct of an agency or agent of a political unit that is included in a state causes injury to an alien, such conduct is attributable to the state to the same extent as conduct of an agency or agent of the state, subject to the special rule stated in Section 193 (3) as to a contract of a political subdivision of a state.
>
> *Comments*:
>
> (a) *Federal state*. Conduct of local authorities is attributable to the central government of a state without regard to the nature of the state's constitution. Although component units of a federal state have certain attributes of sovereignty for domestic purposes, and may, as in the case of the United States be known as 'state', they are not treated as separate states under international law . . .[1]"

To the same effect is the resolution adopted by the Third Committee of the Hague Codification Conference in 1930, which provides

> "Article 8 (1). International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State."

It is clear from the ample authority, of which the above passages are only examples, that the acts and omissions of the President of Sicily, the Mayor and the Prefect of Palermo are imputed to the Government of Italy both by the general rule and the rule covering acts of officials of subdivisions of the State.

Moreover, the Regional President, the Mayor of Palermo, and the Prefect are not just local officials, but are officials of the National Government as well. When the President of the Sicilian Region threatened the catastrophe which befell ELSI's American shareholders, his own words make it clear that he was speaking not only for the Region, but for the Central Government. When the Mayor of Palermo issued the requisition decree, he was then acting in his capacity as a National Officer. Likewise, when the Prefect delayed in ruling on the legality of the requisition, he was also acting as an agent of the National Government.

When ELSI's employees unlawfully occupied ELSI's plant, no government official whatsoever moved to expel them and enforce the existing laws and treaty obligations prohibiting such occupation. This omission to act on the part of those chargeable under Italian law with enforcing this law also is directly attributable to the Government of Italy.

Although it is clear that they were acting as Central Government officials, whether the Regional President, the Mayor and Prefect were acting in their local or national capacities is actually of no consequence. In all cases, the acts or the failure to act of these officials are attributable to the Government of Italy. These officials were unquestionably acting, or failing to perform acts within "their official capacity"[1], their "actual or apparent authority"[2], and "the limits of their authority"[3].

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[1] Restatement, Second, Foreign Relations Law of the United States (1965).

V. Standing of the Government of the United States

The Government of the United States has standing to present this claim on behalf of the American corporations, Raytheon Company and the Machlett Laboratories, Incorporated.

A. Corporate Nationals of the United States

From the date of injury to the present date, Raytheon and Machlett continuously have been corporate nationals of the United States under any test recognized by international law.

1. Siège Social

Raytheon and Machlett are United States corporations under the *siège social* test of nationality. It holds that a corporation is a national of the state where the centre of its activities is found. The centres of Raytheon's and Machlett's activities are in Lexington, Massachusetts, and Stamford, Connecticut, respectively. At these sites they hold their board meetings, have corporate offices and their principal places of business, and direct their manufacturing and sales activities. There are no other locations, particularly locations outside the United States, which could be considered as the *siège social* of these two companies.

2. Genuine Link

Raytheon and Machlett are both strongly and genuinely linked to the United States by virtue of their stock ownership. All of the stock of Machlett is owned by Raytheon and a large majority of Raytheon's stock is and has been owned from the date of the injury on which this claim is based to the present date by United States citizens as is shown in the accompanying Statement of Claim. Accordingly, they are United States corporations under the "genuine link" test[4].

3. Situs of Incorporation

As shown in the Statement of Claim, both Raytheon and Machlett were incorporated under the laws of the territory of the United States, Delaware and Connecticut, respectively. They are, and have been at all times from their incorporation to the present date, corporations in good standing under the laws of such states. The FNC Treaty provides in Article II, paragraph 2:

> "Corporations and associations created or organized under the applicable laws and regulations within the territories of either High Contracting Party and shall be deemed to be corporations and associations of such High Contracting Party and shall have their judicial status recognized within the

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[1] Salvador Commercial Company, XV *Reports of International Arbitral Awards* 477 (1902).

[2] Restatement, Second, Foreign Relations Law of the United States (1965).

[3] Article 8 (1). Resolution of the Third Committee of the Hague Codification Conference of 1930.

[4] *Nottebohm* case (*Liechtenstein* v. *Guatemala*) 6 April 1955, *I.C.J. Reports 1955*.

territories of the other High Contracting Party whether or not they have a permanent establishment, branch or agency therein."

In view of Raytheon's and Machlett's unassailable genuine links to the United States, the provisions of Article XXIV, paragraph 5, of the FNC Treaty[1] are not applicable. Third country nationals do not have any direct or indirect controlling interest in either of the claimants. Accordingly, Raytheon and Machlett are United States corporations under the situs of incorporation test.

4. Conclusion

Under any test recognized by international law, the nationality of Raytheon and Machlett is irrefutably American.

B. Standing to Represent Shareholders

The Government of the United States, under rules of international law, is entitled to espouse the claim of its nationals, Raytheon and Machlett, as stockholders of the Italian corporation, ELSI. The rule of international law, on which such entitlement is based, is expressed in the decisions of international tribunals, in treaties, in the practice of the Governments of Italy, the United States, and many other countries, and in the writings of international legal scholars.

1. Resumé of Pertinent Facts

The following is a brief resumé of the facts which buttress the standing of the United States to represent the ELSI shareholders:

(i) Raytheon and Machlett are American national corporations under any theory recognized by international law.

(ii) Together they own one hundred percent of the ELSI stock.

(iii) ELSI was an Italian corporation and Italy is the respondent State in this claim.

(iv) Diplomatic representation of the ELSI stockholders by any State other than the United States is not possible.

(v) ELSI is defunct. In view of the diminished asset value (caused by the acts and omissions on which this claim is based), the Curator in bankruptcy represents the creditors of ELSI, not ELSI, and not ELSI's shareholders.

(vi) In view of ELSI's defunct status, the shareholders emerge as the real parties in interest with respect to (i) their interests in ELSI, (ii) their stockholders' rights (as distinct from their interests) which were taken from them by the acts and omissions of the Italian Government, and (iii) the protection afforded to United States nationals through customary international law and treaty provisions.

2. The Practice of the Governments of Italy and the United States

Again, the Governments of Italy and the United States enjoy a similar approach to the espousal of stockholder claims. Their positions are based upon the realities. Both Governments recognize that damage to a corporation whose shares are largely held by foreigners gives rise to real damage to the shareholder and consequent interest in the stockholder's government to protect his economic rights and interests.

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[1] "Each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest."

A State has a right to bring a claim on behalf of its citizens shareholders of a foreign corporation when the corporation is incorporated in the respondent State[1].

(a) The Practice of the Government of Italy

In accordance with the above principle, the Government of Italy sought damages on behalf of its citizens resulting from damages *(a)* to a Colombian legal entity[2] and to a Peruvian legal entity[3] of which Italian citizens were shareholders. In the *Canevaro* case, Scialoja, representing the Government of Italy, in answering Peru's claim that the action by the Government of Italy was not directed to protect the personal interests of the Canevaro brothers but their indirect interests, stated the following:

> ". . . Même si l'on admettait que la Société José Canevaro é Hijos, comme ayant son siège à Lima, était dans sa constitution sociale soumise à la loi péruvienne, cela ne diminuerait jamais le droit que l'Etat italien a de protéger comme ses propres sujets les sociétaires italiens de la maison, même dans les droits qui leur viendraient en passant par la personne sociale[4]."

(1) The *Cerruti* Case

The *Cerruti* case eventually involved both the United States and Italy. It arose over losses of an Italian national through confiscation in 1885 by the Government of Colombia of the property of the Colombian Sociedad en Comandita in which Cerruti had an interest. The Company was, according to Colombian law, a legal entity in the form of "a commercial association which, by the very constitution, was invested with Colombian nationality and cannot be considered as a foreign firm"[5]. So strongly did Italy adhere to the right to espouse stockholder claims that it vigorously and tenaciously pressed its claim over a period of 25 years, in spite of the persistent objections that Italy had no standing to bring the claim in view of the company's Colombian nationality. The dispute was first submitted to the Government of Spain, which held for Italy[6]. Later, the President of the United States was appointed arbiter, and in 1897 he made an award in favor of Italy in which he stated,

> "The claims of said Signor Ernesto Cerruti for injury sustained by him

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[1] Santamaria, "La Tutela dei Soci nel Diritto Internazionale", *Rivista delle Società*, 1965, pp. 1110 and 1130.

[2] *Cerruti* case.

[3] *Canevaro* case, *American Journal of International Law*, 1916, pp. 709 et seq. and 746 et seq.

[4] ". . . Even if one admits that the Society José Conevaro é Hijos, having its office at Lima, was under its by-laws subject to Peruvian law, that does not diminish the legal right which the State of Italy has to protect the Italian shareholders of the company as its Italian citizens, even under the laws to which they may become subject through the activities of the corporation." Contre-Mémoire présenté par le Gouvernement Italien, Rome, Imprimerie du Ministère des Affaires Etrangères, 1912, pp. 22 et seq.

[5] Bureau, Paris 1899, *The Italo-Colombian Dispute*, pp. 63-64.

[6] IV *AJIL* 1003.

> for reasons of losses and damages to his interests in the firm of E. Cerruti and Company are proper claims for international adjudication[1]."

Italy continued to press for many years after the award for complete monetary restitution for Cerruti, including protection for him from litigation which resulted from seizure of the property of the Colombian firm.

(2) Other Italian Cases

The Government of Italy firmly reaffirmed its position in the *Canevaro* case before the Permanent Court of International Justice, stating that it had a right to protect "Italian nationals who are members of a foreign juridical person"[2]. It was, in addition, asserted that "The Italian State had a right to protect the Italian members of the firm, even with regard to rights which are merely derivative from the juridical person", and that "even if the rights of the firm, a juridical person, are distinct from those of the shareholders, it exercises such rights in reality in the interests of the latter"[3].

(b) United States Practice

(1) The *Delagoa Bay Railroad* Case

In this case, the Government of Portugal took, without paying due compensation, the railroad property of a Portuguese corporation, and cancelled its concession to operate it. The shares of the Portuguese corporation were owned by an English company whose shares in turn were owned by one MacMurdo, an American national. England (on behalf of the corporation) and the United States (on behalf of its national shareholder) intervened diplomatically. Portugal agreed to arbitration with three jurists selected by the President of the Swiss Confederation. On 29 March 1900 the Tribunal held for the claimant Governments[4].

This case has been recognized by governments and international legal students as a precedent for the rule that a government is entitled to espouse a claim on behalf of its stockholders in a foreign corporation.

(2) The *El Triunfo* Case

The El Triunfo Company (under a concession contract obtained in 1894 from the Government of El Salvador) developed and operated the port of El Triunfo. The bare majority of 501 of its 1,000 shares of stock were owned by an American company, and 35 shares were owned by other American nationals. In 1898, several Salvadorian directors usurped the powers of the company's American president and directors, and filed a petition in bankruptcy. The local courts refused to grant the plea of the American investors to reinstate the lawfully elected officers of the company and to quash the bankruptcy proceeding. The "taking" resulted from the bankruptcy and the other actions of the respondent Government. In reply to the demand of the United States for arbitration, El Salvador claimed that the case involved one of their corporations and should be settled entirely in their courts. The United States prevailed, using the *Delagoa Bay Railroad* case as a precedent in its position that States have rights under international law to espouse claims of their national stockholders in foreign corporations. The arbitrators found in favor of the United States with respect to espousal of stockholder claims[1].

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[1] II Moore, *International Arbitrations*, pp. 2117, 2121; see also De Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, pp. 630-631.

[2] Breck, *La sentence arbitrale dans l'affaire la Canevaro*, p. 40.

[3] De Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, p. 632.

[4] Volume VI Moore, *Digest of International Law*, p. 649.

Specifically, the award states:

> "We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in the El Triunfo Company, a domestic corporation of Salvador, *for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railroad Arbitration*[2]." (Emphasis added.)

(3) The *Ruden and Company* Case

Ruden, an American national, was a partner in a Peruvian firm, which, under the law of Peru, was a legal entity. The Mixed Claims Commission, established by treaty between the United States and Peru on 4 December 1868 found that Ruden's claim should be allowed for his interest in the firm resulting from damage to the firm's property.

Lapradelle and Politis, in their *Recueil des Arbitrages Internationaux*, Volume II, page 592, Paris, 1932, make the following comment on the *Ruden* case, stating that the question was:

> "Whether one should consider in a complete abstract manner the nationality of the association, or whether one should consider in a concrete way the nationality of the members of the association. In the first case, Ruden, an American member of a Peruvian company, should not be able to claim anything or obtain anything from Peru. However, in allowing Ruden's claim as an American member in a Peruvian association, *the arbiter thus rejects the abstract concept of the personality of the association to look behind it to the real persons of the association*." (Translation; emphasis added.)

De Visscher, reaching the same conclusion, states as follows:

> "The Commission recognized the Peruvian nationality of the association; nevertheless, it accorded an indemnity to an American national, Ruden, based on his personal interest in the association. *The only explanation of the decision is that the arbitrators above and beyond the personality of the association looked to the personality and nationality of its members*." (Translation; emphasis added.)[3]

(4) The *Shufeldt* Case

Shufeldt, an American national, had an interest in a Guatemalan partnership association which suffered losses due to unlawful acts of Guatemala. Under the arbitration which ensued, Guatemala claimed that under its law the association "has corporate existence", and that the United States "has not *locus standi* in order to present any claims of whatever nature"[4]. The award upheld the position of the United States, and entirely rejected the defenses raised by Guatemala. In this connection, the award stated:

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[1] VI Moore, *Digest of International Law*, pp. 649, 650; *US Foreign Relations 1902*, pp. 859-873.

[2] *US Foreign Relations 1902*, p. 873.

[3] Charles de Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, p. 628.

[4] US Department of State *Arbitration Series*, No. 3, pp. 630, 431-435, 821-831.

> "... it makes no difference ... whether any partnership was in existence, as it is not the rights of the partnership that are in question *but the personal interest of Shufeldt in the partnership*". (Emphasis added.)
>
> "... The Guatemalan Government was trying to do what it could not do in the eyes of international law. *International law will not be bound by municipal law or by any thing but natural, justice, and will look behind the legal person to the real interest involved.*" (Emphasis added.)[1]

(5) Consistency of the United States Position to Date

The United States has consistently adhered to the rule that a State has standing to represent its nationals who have a substantial shareholder interest in a foreign corporation. Published evidence of such adherence as recent as 1965 is found in the US Department of State Memorandum of Law submitted in connection with its claims on behalf of the US-Mexican Imperial Development Company. In pertinent part, this memorandum states:

> "... the Government of the United States has the right under principles of international law to intervene or espouse a claim on behalf of nationals of the United States who own a substantial interest in a corporation organized under the laws of ... [a foreign country][2]".

3. Practice of Other States

Many other States have relied upon the rule that they have the standing to represent stockholders.

Successful representation of diplomatic claims by governments whose citizens own substantial stockholder interest in corporations which suffered damage at the hands of another government has many precedents. Foreign relations documents are replete with examples.

(a) Mexican Eagle Oil Company

The British Government expressed its right to present such a claim in a note sent to the Mexican Government in 1938 in connection with damage done to the Mexican Eagle Oil Company.

> "His Majesty's Government are not invervening on behalf of the Mexican Eagle Company, but on behalf of the very large majority of shareholders who are of British nationality.
>
> They are perfectly well aware of the Mexican nationality of the Mexican Eagle Company itself in the sense that it is incorporated under Mexican law, and in no way seek to deny this.
>
> But, the fact remains that the majority of shareholders who are the ultimate sufferers from the action of the Mexican Government are British, and the undertaking in question is essentially a British interest.
>
> For this reason alone, His Majesty's Government have the right, which cannot be affected by anything in the Mexican Constitution, to protest against action which they regard as unjustified ...[3]"

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[1] *Id.*, p. 875.

[2] Whiteman, *Digest of International Law*, Vol. 8, pp. 1272-1273.

[3] *Id.*, p. 1273.

The British note pointed out in this connection that:

> "If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad[1]."

The Government of Mexico agreed with the British Government to make payment for the expropriated property of the oil company[2].

(b) The *Ziat Ben Kiran* Case

One of the claims submitted by Great Britain under its agreement with Spain for damage incurred in the Spanish Zone of Morocco was on behalf of a British member of a partnership which was a legal entity under Spanish law. Arbiter Huber, Judge of the Permanent Court of International Justice, held that Spanish objections based upon the Spanish nationality of the firm were inadmissible. In spite of the fact that under many jurisdictions partnerships have a legal personality apart from their members, he held that:

> "The jurisprudence of international tribunals recognizes the possibility of distinguishing, for the purposes of international arbitration, between the component parts of an association on the one side and the association itself on the other. International law, which in this matter is governed mainly by considerations of equity, has not so far established any formal test for admitting or refusing diplomatic protection of national interests bound up with interest vested in another nationality. It is necessary to examine whether the person on whose behalf the claim is brought forward is directly affected by the damage . . .[3]"

De Visscher, Judge of the Permanent Court of International Justic and of the International Court of Justice, in his article on *Diplomatic Protection of Shareholders in Corporations*, makes the following observation as to this decision:

> "The award rendered by Max Huber, former President of the Permanent Court of International Justice with regard to the British reclamation in the Spanish Zone of Morocco . . . underlines very well the difference between the viewpoints of internal law, dominated by the conception of the unity of the juridical person and *the viewpoints of international law which are determined by the considerations of justice and equity and which command the protection of the stockholders*." (Emphasis added.)[4]

(c) The *Case of the Forests of Central Rhodopia*

Greece espoused the claim against Bulgaria on behalf of several of its nationals who were shareholders in a Bulgarian corporation. The question before the arbitrator was whether Greece could espouse the claim in spite of the fact that the corporation was in existence and that non-Greek nationals were also shareholders of the company. This question is not present in the case of ELSI whose shareholders all are American nationals. Nevertheless, the arbitrator found for the Greek Government, stating:

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[1] Whiteman, *op cit.*, at 1274-1279.

[2] *Id.*, at 1272-1273.

[3] *Réclamations britanniques dans la zone espagnole du Maroc*, Hague, 1925, p. 185; *United Nations Reports of International Arbitral Awards*, Vol. II, pp. 729-730; *Annual Digest of Public International Law Cases*, 1923-1924, p. 190.

[4] De Visscher, "Protection diplomatique des actionnaires des sociétés", in *Revue de droit international et de législation comparée*, 1934, p. 632.

> "According to the minutes of the meeting of the Company . . . there were eight interested parties, namely, besides the five persons whose rights the Greek Government invokes in this case, the two Bulgarians . . . and the Turk . . . Admitting that it has not been proved that any of them withdrew from the company . . . the Arbitrator can only presume that there were at that time the eight persons interested in the company . . . It may be presumed . . . that their shares were equal. It follows that *the three claimants whose interests the Greek Government is competent to represent in the present case hold in the company a financial interest corresponding to 260/640 of its assets*[1]." (Emphasis added.)

In this decision, the arbitrator clearly looked behind the corporate veil to the real parties in interest. In this regard, the decision is in line with the precedents.

4. Agreements of States Recognizing Stockholder Claims

It is common practice for States to recognize the validity of paying compensation for the interests of stockholders even when the agreement is drawn up subsequent to the taking of the corporate property. Often such agreements are entered into effecting settlements with stockholders when their corporation is nationalized[2].

It is significant that these agreements are all entered into subsequent to the time the damage arose, and accordingly are expository of the practice of States in their recognition of customary international law.

The Treaty of Versailles of 1919 provides for payment to shareholders by providing in Article 297 *(e)* of the Annex relating to Germany:

> "The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914."

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[1] *American Journal of International Law*, 1934, Vol. 28, pp. 774, 801.

[2] Compensation Agreements providing for settlement with *Stockholders* of nationalized corporations.

Agreement of 17 March 1960, Romania and Denmark.
Agreement of 10 November 1960, Romania and Great Britain.
Agreement of 1 February 1955, Hungary and Belgium/Luxembourg.
Agreement of 12 June 1950, Hungary and France.
Agreement of 19 July 1950, Hungary and Switzerland.
Agreement of 27 June 1956, Hungary and Great Britain.
Agreement of 19 March 1948, Poland and France.
Agreement of 14 November 1963, Poland and Belgium/Luxembourg.
Agreement of 11 November 1954, Poland and Great Britain.
Agreement of 12 May 1949, Poland and Denmark.
Agreement of 25 June 1949, Poland and Switzerland.
Agreement of 26 May 1959, Bulgaria and Denmark.
Agreement of 22 September 1955, Bulgaria and Great Britain.
Agreement of 28 September 1949, Czechoslovakia and Great Britain.
Agreement of 13 July 1959, Yugoslavia and Denmark.
Agreement of 14 April 1951, Yugoslavia and France.
Agreement of 23 December 1948, Yugoslavia and Great Britain.

Similarly, the Italian Treaty of Peace of 1947 provides in Part VII, Section I, Article 78:

> "United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 *(a)* of this Article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with sub-paragraph *(a)* above."

5. Opinions of International Legal Scholars

International legal scholars and publicists have for many years recognized the reality and the equity of the right of a State under international law to protect stockholder interests of its nationals in foreign corporations.

A profound study of whether stockholders in the position of the claimants may be protected diplomatically by their governments is made by Charles de Visscher in his article, "*De la protection diplomatique des actionnaires d'une société contre l'Etat sous la legislation duquel cette société s'est constituée*, in *Revue de droit international et de législation comparée*, 1934, pp. 624 et seq.

The position of Judge de Visscher is clear and concise. After an exhaustive examination of diplomatic practice, arbitral jurisprudence, the treaty provisions and the prevailing doctrine he states:

> "My conclusions will be short. Imperious considerations of justice, for a long time already recognized by diplomatic practice and the arbitral jurisprudence confirmed by an exact analysis of the true role of the juridical personality and of the nationality of corporations under international law lead to the recognition of the right of diplomatic protection for a State in favour of its nationals who own a majority (or a substantial part) of the stocks of a foreign corporation, when the measures taken of which the corporation is a victim, emanate from the very State under the laws of which the corporation is constituted . . ."

The Swedish scholar Halvar Sundberg expresses the same opinion in his work on international law "*Folkrätt*", 2nd edition, 1951. As to nationality, he states, *inter alia*:

> "Different principles may be applied in deciding the nationality of juridical persons . . . The development especially in the field of just compensation for damages incurred, has been away from any formal criteria towards giving more and more consideration to the realities behind the corporate veil. Thus already in the Alsop Claim . . . the Chilean defense was overruled that the claims of the corporation (incorporated in Chile) could not be the subject of an international arbitration . . . *Thus is it the nationality of the persons who own the controlling interests in the corporation which in the last instance decide to what country the corporation belongs* . . . As the stockholders are the persons who in the very last instance decide, it is consequently the nationality of the stockholders that decide the nationality even of the corporation." (Emphasis added.) (Pp. 151-152.)

Particularly with regard to the ELSI fact situation, the logic of the analysis of Professor Bagge set forth below is inescapable.

> "The shareholders, it would seem, are in a different position [than Bondholders]. As component parts of the Corporation they have an actual share in its assets even though during the existence of the Corporation their

> possibility of enforcing rights based on this share independently of the corporation is limited by municipal law applicable for the corporation. If the value of their share in the actual surplus assets of the corporation has been diminished by damage inflicted on its property, the damage thereby caused to the shareholder seems to be so intimately and directly connected with the damage inflicted on the property of the corporation that it should reasonably be considered to constitute sufficient basis for intervention . . . The conclusion ought then to be that if the shareholder has suffered damage by the act committed by the foreign State and this act constitutes a breach of international law, there is, according to the international rule mentioned above, sufficient ground for an intervention by the State whose subject the shareholder is[1]."

German and Swiss international law publicists have expressed the same views. See, for instance, *von Bar* in *Eine Internationale Rechtsstreitigkeit, Iherings Jahrbücher* (1903), Vol. 45, pp. 161 et seq., pp. 192-195.

Another German publicist *Mosler* has recently also expressed the view that the property interests in the corporation are decisive with respect to the question of diplomatic protection:

> "*If they belong to natural persons who are aliens, then their State may intervene on their behalf*, regardless of the law under which the corporation as such has been constituted[2]."

These views are fully shared by recent Swiss publicists. (See, in this connection, *Bindschedler, Verstaatlichungs-Massnahmen und Entschädigungspflicht nach Völkerrecht*, pp. 50-52, Zurich, 1950.)

Similarly the well-known Swiss jurist, *Paul Guggenheim* in his *Lehrbuch des Völkerrechts* so asserts (Vol. II, 1948 ed., pp. 291-292).

John Basset Moore, in an opinion written in 1920, expressed his views as follows:

> "The fundamental right of the beneficial owners is recognized and protected in international law as well as in municipal law.
>
> This fact has been *strikingly exemplified in recent years in international cases in which it was sought to interpose the corporate entity as a bar to intervention* by a government for the protection of beneficial interests of its citizens which were sacrificed or injured by unjust administrative or judicial acts.
>
> It is superfluous to remark that no one denies that there is such a thing as a corporation, or that, whether it be called a 'legal entity', a 'legal personality' or what not, it is regarded as possessing, by virtue of its attachment to some place, in a certain sense 'nationality' . . . *But it by no means follows that the partners or shareholders have lost either their beneficial ownership of the property or the right to be protected in such ownership*[3]." (Emphasis added.)

As to the legal consequences of these views Borchard asserts:

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[1] Bagge, "Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and Rights of Shareholders", XXXIV *AJIL* 162 et seq.

[2] Mosler, *Wirtschaftskonzessionen bei Aenderungen der Staatshoheit*, p. 44, Stuttgart, 1948.

[3] Moore, *Collected Papers*, Vol. V, p. 268.

> "Practice consequently permits itself to consider the stockholders as the real interested parties and to determine the right to reparation of damages suffered by a corporation according to the nationality of the stockholders who indirectly are the persons injured by the act[1]." (Translation.)

Charles Cheney Hyde clearly expresses himself to the same effect in his *International Law* (2nd ed.). With regard to the right of a government to intervene on behalf of national interests in a foreign partnership, even if this foreign partnership, according to the law of the land, constitutes a juridical entity, he states:

> "The fact that an American citizen enters into a partnership with foreigners whose business is established in a foreign State . . . does not affect his right or that of the United States acting on his behalf to regard his individual interest in the firm as essentially American property, entitled to the same protection as any other such property similarly located. The opinions of arbitrators appear to sanction this view. Even when the partnership according to the law of the country where it is established is regarded as a juridical entity possessing functions similar to those of a corporation, the United States does not hesitate to espouse the cause of individual members who may be American citizens when circumstances necessitating interposition arise[2]."

After an analysis of several of the relevant Arbitrations and Claims Conventions, Hyde reaches the following conclusions:

> "The terms of the foregoing as well as numerous other claims conventions testify to the existence of a practice acknowledging the propriety of interposition for cause in behalf of nationals interested through ownership of stock or the securities of a corporation created under the laws of a foreign State. The reasonableness of such action is attributable to the closeness of the relationship between a State and its nationals whose pecuniary interests in the foreign corporation are adversely affected by conduct of which complaint is made . . ."

6. ELSI, a Defunct Corporation

The standing of the United States to bring this international claim is further buttressed by the fact that ELSI is defunct. It was, and if it can be said to exist at all, is yet entirely helpless to assist itself by reasons of its financial condition, the requisition of its assets and its bankruptcy. In March of 1968, the situation was so serious that Raytheon and Machlett had moved to direct its orderly liquidation. The requisition of its assets forced ELSI's bankruptcy, thus completely and permanently deprived ELSI from taking any measures on its own behalf. As a consequence, its property and all of its affairs were in the hands of the Mayor of Palermo and the Curator in bankruptcy.

International legal precedents have long recognized the logic of espousal by the State whose stockholder nationals emerge as the real parties in interest when the corporation has ceased to function. Professor Wortley, in pointing up the significance of the *Delagoa Bay Railroad* case in this connection, states:

> "The Rudens Case, decided by the United States-Peruvian Claims Court of 1868, is the *fons et origi* of the distinction between a firm and its members, though Dr. Mervyn Jones has indicated that the first important arbitral

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[1] *Annuaire de l'Institut de droit international*, 1931, Vol. I, p. 308.

[2] Vol. II, pp. 901-902.

> decision recognizing the right of shareholders to have representations made on their behalf was the Delagoa Bay Railway Company Case, decided in 1899. In that case, it was alleged that as the Company was 'practically defunct', a claim on behalf of shareholders could be made. This method appears to be normal diplomatic procedure now[1]."

Similarly, a British note to Romania with regard to the seizure of the Astra Romana Company stated:

> "The British majority of beneficial shareholders and His Majesty's Government therefore regard Astra Romana as *being in a state of forcible dissolution*, and those shareholders have therefore informed the foreign staff serving with Astra Romana of this situation, and we are advising them to repatriate themselves. His Majesty's Government reserve all right to intervene on behalf of the majority beneficial shareholders, *who must henceforward be regarded as being endowed with the powers and rights formerly endowed by Astra Romana*[2]." (Emphasis added.)

By requisitioning ELSI's assets without taking any responsibility for its liabilities, the Government of Italy forced ELSI into bankruptcy. ELSI had been informed by governmental officials that the imposition of the requisition would continue indefinitely[3]. (The requisition remained for 1½ years before being held illegal.) In order for ELSI to remain solvent at this critical juncture, it had to have complete freedom to deal with its assets in its best interests and in the best interests of its creditors. ELSI had substantial obligations which had fallen due. Demand for payment had been made. Under such circumstances, with no way to take care of its liabilities and past due obligations, with its assets tied up indefinitely by the Government's illegal requisition, ELSI faced a long indefinite period in which it would not be able to meet its obligations. For this same indefinite period (or permanently), ELSI's assets and business would be handled by others. Many of the assets would immediately decline in value if not handled expertly. Accordingly, ELSI not only was unable to meet delinquent obligations in the immediate future, but there was a substantial question, under the circumstances, whether it would ever regain control over assets which would have enough value to satisfy its obligations. The Italian law (as does the law of most countries) leaves no alternative to bankruptcy in such a situation. Failing to file a voluntary petition in bankruptcy under such circumstances is a criminal offense in Italy[4].

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[1] Wortley, *Expropriation in Public International Law* 144 (1959).

[2] *Times*, 12 March 1948.

[3] Exhibit III-12.

[4] Law on Bankruptcy — Royal Decree No. 267 of 16 March 1942.

TITLE 6

CRIMINAL PROVISIONS

CHAPTER 1

CRIMES COMMITTED BY THE BANKRUPT PERSON

"Art. 217. 'Bancarotta semplice'. The entrepreneur who, outside the case provided for by the preceding articles: . . .

(4) Has aggravated his own insolvency by not filing voluntary petition for his bankruptcy or by other grave fault.

Is punished by imprisonment from six months to two years in the event is declared bankrupt.

In support of the proposition that the shareholders may step in where the corporation is incapacitated, Hackworth, in discussing the *Romano American* case (1925) states:

> "It (the UK) further contends that where the action of the government against whom the claim is made, in law or in fact put an end to the Company's existence or, by confiscation of its property, has compelled it to suspend operations . . . is in fact . . . an application of the general rule; for it is not until the company has ceased to have an active existence or has gone into liquidation that the interest of the shareholders ceases to be merely the right to share in the Company's profits and becomes a right to share in its actual surplus assets[1]."

In view of the helplessness of ELSI during March of 1968, Raytheon and Machlett moved in their own interests as well as those of ELSI and its creditors to assist ELSI in an orderly liquidation. While in this precarious and fragile position, they were hit with the requisition of the ELSI assets and ELSI was forced into bankruptcy. The bankruptcy incapacitated ELSI and it was no longer able to act on its own behalf. The actions of the Government of Italy in the circumstances directly affected Raytheon and Machlett giving rise to the espousal of their claim by the Government of the United States.

7. *Direct Infringement of Stockholder Rights*

Virtually all authorities agree that a diplomatic claim may be based upon infringement by the respondent State of a shareholder's direct rights.

The laws of nearly all States — certainly those of the United States and of Italy, repose in the stockholders all of the fundamental decisions to be made with respect to a corporation. These include the selection of its Board of Directors, and thus its executive officers (Delaware Corp. Law, §§ 211, 142, Italian Civ. Code § 2364); and the duration or dissolution of the corporation (Delaware Corp. Law, §§ 122, 275, Italian Code § 2488).

Not only are its activities during its lifetime governed by the stockholder organization, but the life of the corporation itself is in the hands of the stockholders. Its life can be terminated by them at will, whether the corporation is prospering or not. Thus, the right to bring about an orderly dissolution is as formidable and as real as any right the stockholders hold. To deprive them of this right is a direct infringement of one of their most substantial rights.

While it is true that the fortunes of the stockholder rise and fall with the success or failure of the corporation, the corporation is not autonomous. It is subject at all times to the direction of the stockholders who, on a continuing basis, take

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Apart from the other collateral penalties set forth in Chapter 3, Title 2, Book I of the Criminal code, the conviction bears as a consequence disqualification of up to two years to carry on a commercial enterprise or to hold a managerial office in any enterprise.

CHAPTER 2

CRIMES COMMITTED BY PERSONS OTHER THAN THE BANKRUPT

Art. 224. 'Fatti di bancarotta semplice'. The penalties provided for by Article 217 apply to directors, general managers, statutory auditors and liquidators of corporations which are declared bankrupt, who:

(1) have committed any one of the offenses provided for by the aforementioned Article . . ."

[1] Hackworth, *Digest*, IV (1943), Vol. 5, p. 840.

share in the corporation's ventures not only through dividends, but also in the value of the corporate assets. Particularly when the latter would be worth more in liquidation than the value of the stock, an orderly liquidation is one of the shareholders' most cherished rights. Although the shareholders had laid elaborate plans and had taken steps to have these plans carried to fruition, the ELSI shareholders were denied this most valuable right by actions of Italian officials. Such actions, *inter alia*, included the illegal requisitioning of the ELSI assets which indeed blocked the orderly liquidation and plunged ELSI into bankruptcy, thereby causing serious deterioration of the asset values and embarrassing the stockholders in the international marketplace.

Although generally applicable to corporations in Italy and the United States, as well as the rest of the civilized world, the above principles have particular relevance to the ELSI situation. The ELSI stock was owned by only two US corporations which were international leaders in the same electronics business in which ELSI was engaged. Their ability to take decisive and successful liquidation was assured. Dissolution of a corporation whose stock ownership was widely defused might require an enormous effort to concert stockholder action. But the prospects of ELSI's success were high. The stockholders not only were united but they knew the product lines, could continue supplying valued customers *ad interim*, and could get the best prices for product lines because of their intricate knowledge of their value, and the assistance in operating them which they could furnish purchasers.

In addition, the creditors of ELSI have sued the stockholders, as opposed to ELSI itself, in an attempt to collect ELSI's debts. All of these suits (which are described in detail in Part I of this claim) have resulted from the fact that the stockholders were deprived of their direct right of an orderly liquidation in which the ELSI assets would have been sold in a manner which would have realized their actual value, making possible amicable settlements with these creditors. Irrespective of the merits of these suits, the stockholders, and not the defunct corporation or the Curator in bankruptcy, must put forth the effort and expend the funds to defend against them.

That the right of an orderly liquidation of its subsidiary ELSI was taken from Raytheon and Machlett cannot be denied. At the time of the requisition, steps had been taken to liquidate ELSI in an orderly fashion. Liquidation was to be conducted by experienced personnel of the stockholders' choosing. The taking of the property which was to be sold in the liquidation obliterated this important direct right. The obliteration of this right was an infringement of the direct stockholder rights of the claimants. The Government of the United States accordingly has standing to present a claim based upon the infringement of such rights.

8. Standing of the United States Based upon Conventional International Law — US-Italian Treaty Provisions

The FNC Treaty protects the interests of stockholders as well as their direct rights and, accordingly, affords the United States standing to present a diplomatic claim based upon such stockholder interest.

There can be no doubt about the plain meaning of the Treaty of Friendship, Commerce and Navigation between Italy and the United States in this regard. The first sentence of Article III of the Treaty assures the corporations of each country the right to organize and participate in corporations of the other country. It specifically provides for the right to purchase, own and sell shares of stock in corporations of the other country.

Article V, paragraph 2, prohibits the taking by either party of property of the nationals of the other party without due process of law and without prompt payment of just and effective compensation; and paragraph 1 of the Protocol states that this provision "shall extend to *interests held directly or indirectly*".

The last sentence of paragraph 3, Article V, granting most favored nation treatment to the nationals and corporations of each country under the jurisdiction of the other "in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control" grants protection to "enterprises in which the nationals, corporations and associations of either High Contracting Party have a *substantial interest*". In 1961 the two Governments supplemented their Treaty on Friendship, Commerce and Navigation for the stated purpose of "giving added encouragement to investments of one country in useful undertakings in the other country". This supplementary Agreement further states that the parties are "cognizant of the contribution which may be made towards this end by amplification of the principles of equitable treatment set forth in the Treaty . . .". In Article I of this Supplementary Agreement the parties agree not to subject nationals or corporations of either party "to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: *(a)* preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, *(b)* impairing their other legally acquired *rights* and *interests* in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise) . . ."[1].

Attempts to distinguish between "rights" and "interests" are at best legalistic and are virtually meaningless when used in connection with subsidiaries. The fallacy of such attempts is recognized by the protection afforded both rights and interests (which arise from ownership of shares of stock) under the FNC Treaty.

9. *Conclusion*

ELSI is incorporated under the laws of Italy, and the acts and omissions which give rise to this claim are those of the Government of Italy. The unassailable logic of allowing the stockholders' State to pursue a diplomatic claim against the respondent when the latter is the State of incorporation virtually speaks for itself.

Moreover, all of the ELSI stock is held by two American companies. Only one claimant government could result from stock ownership. But for the espousal by the United States there could be no representation on the international plane in connection with the taking of the ELSI assets which in actuality were totally owned by foreign investors.

Accordingly, it is submitted that the United States has standing to represent the US Corporations, Raytheon and Machlett, and to present this claim on their behalf as a result of their ownership of the ELSI stock.

VI. Exhausion of Local Remedies

It is generally recognized that local remedies must be exhausted before a claim may be formally espoused under principles of international law. Such principle was authoritatively expressed in the Institute of International Law on 18 April 1956 as follows:

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[1] Agreement Supplementing the Treaty of Friendship, Commerce and Navigation of 2 February 1948; entered into force 2 March 1961. 12 *UST* 131, 404 *UNTS* 326. Preamble and Article I.

> "When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a juridical body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient so long as the normal use of these means of redress has not been exhausted[1]."

In a landmark decision referred to as the *Finnish Vessels* arbitration[2] the arbitrator enunciated the rule and then proceeded to study the facts in great detail. He finally reached the conclusion that any further effort on the part of the plaintiff would have been "*obviously futile*" and that as a result the plaintiff indeed had exhausted his local remedies.

> "The prior exhaustion of local remedies cannot be required when . . . even though the formal possibility of a remedy exists, such remedy cannot be expected to lead to any practical result[3]."

The rule of the prior exhaustion of local remedies is valid only when the local remedies offer a real prospect of obtaining a reimbursement of the damages suffered[4].

In the controversy with France concerning the Moroccan phosphates, the Government of Italy maintained that due to the considerable delay in the issuance of the decision under the local remedy, the Government of Italy was not required to comply with the rule of the prior exhaustion of local remedies[5].

This exception to the rule has been variously phrased and interpreted in numerous cases. It is clear, however, that the remedy to be exhausted must be a real one capable under the circumstances of redressing the claimant's injury.

> "Thus the international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy. If these are instrumental in making an otherwise effective remedy ineffective, and if they are more the outgrowth of the State's activity than that of the claimant, then the remedy must be regarded as ineffective for the purposes of the rule[6]."

One case which greatly preceded *Finnish Vessels* which reached the same conclusion was the *El Triunfo* case[7]. In this case a company incorporated in Salvador and owned by United States citizens was fraudulently driven into bankruptcy by the illegal acts of some of its directors. When the United States investors attempted to wrest the company from the illegal bankruptcy proceedings, the Government of Salvador by executive decree granted the concession formerly held by this company to others, citizens of Salvador.

The exhaustion of local remedies question was dealt with in the Award as follows:

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[1] 46 *Annuaire de l'Institut de droit international* 364 (1956).

[2] Finnish Vessels (Finland *v.* Great Britain), 3 *Int. Arb. Awards* 1479 (1934).

[3] Monaco, *Manuale di Diritto Internazionale Pubblico*, Turin, 1970, p. 571.

[4] Gaja, *L'Esaurimento dei Ricorsi Interni nel Diritto Internazionale*, Milan, 1967, pp. 105-115; the author gives a long list of examples when the prior exhaustion of local remedies is not required.

[5] Cour Permanente de Justice Internationale, Publications, *Série C, nº 84*, p. 443.

[6] Mummery, "The Content of the Duty to Exhaust Local Judicial Remedies", 58 *AJIL* 389.

[7] VI Moore, *Digest of International Law*, pp. 649, 650; *US Foreign Relations* 859-873.

> "It is apparent in this case that an appeal to the courts for relief from the bankruptcy would have been in vain after the acts of the executive had destroyed the franchise, and that such a proceeding would have been a vain thing is the sufficient answer to the argument based upon this law of Salvador.
>
> What would have profited these dispoiled American citizens if they had successfully appealed to the courts for the setting aside of the bankruptcy proceedings, after the concession was destroyed by the closing of the port of El Triunfo and the grant of the franchise to strangers?[1]"

Accordingly, although the requirement for a claimant to exhaust his local remedies before seeking diplomatic relief is firmly established in international law, the exception which excuses such a claimant from pursuing remedies where it is futile to expect any effective relief is equally well established.

This is not to say that the litigation in Italy involving ELSI has all been concluded. The contrary is true.

(i) The ELSI bankruptcy and related proceedings have not been concluded.

(ii) The Curator has sued the Government of Italy to recover part of the damage to ELSI which resulted from the illegal requisition.

(iii) The five bank suits againt Raytheon to collect ELSI's unguaranteed debts are still pending.

In none of the outstanding proceedings is it possible for Raytheon and Machlett to recover any compensation which resulted from the acts and omissions of the Government of Italy on which this claim is based.

It is not and was never possible, for example, for Raytheon and Machlett to sue the Government of Italy or any of the officials who were acting in their official capacities for the requisition of the ELSI assets. ELSI took the only effective measure which was available. It appealed immediately from the Mayor's requisition decree. The Prefect under whose jurisdiction it fell did not rule for one and one-half years. When the Prefect did not rule favorably on that appeal immediately, the whole chain of events which led to Raytheon's and Machlett's irreparable damage was set in motion. The management and control of their enterprise was wrested from their hands and they were helpless under Italian law. They had no remedy of a stockholder suit against the Government of Italy to seek relief from their loss of their valuable direct right as stockholders to place their subsidiary into orderly liquidation. Nevertheless, the rights of the stockholders are preserved and protected by customary international law and by the provisions of the FNC Treaty.

The claimants have no local remedies to exhaust in connection with the facts on which this claim is based. The outstanding legal proceedings, with the exception of the bank suits, do not involve the claimants as parties, and, with the same exception, will have no effect on this claim.

Although the fact that the requisition was illegal under Italian law helps buttress this international claim, the claim depends on international law which establishes the standard of conduct against which the acts and omissions of the respondent must be measured.

Even if the Curator in the ELSI bankruptcy is successful in every endeavor he has undertaken to realize the value of ELSI's assets, he would still not have sufficient funds to pay the claimants any amount sought under this diplomatic claim. The preferred creditors may receive some greater amounts and that in turn might affect the amounts of the bank suits against Raytheon. Since the United States is not requesting a specified amount as a result of the bank suits pending their resolution, the effect of neither the bank suits nor the Curator's suit will affect the amount being claimed at the present time. The outcome of the bankruptcy for the same reason will not affect the amount of this claim since it is now clear that the damage inflicted on ELSI and the degradation of the value of the ELSI assets brought about by the acts and omissions of the Government of Italy on which this claim is based will result in no payment to the claimants by the Curator under the bankruptcy proceeding.

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[1] VI Moore, *Digest of International Law*, pp. 649, 650; *US Foreign Relations* 859-873.

In this case ELSI and the claimants promptly and effectively exhausted every remedy which was available to them and, as attested by the accompanying opinions of independent Italian legal experts Avv. Giuseppe Bisconti and Professor Antonio La Pergola, there remain no effective local remedies to pursue. Pursuing further any local remedies available in Italy would be futile and accordingly not required by international law.

Accordingly, Raytheon and Machlett have exhausted every meaningful legal remedy available to them in Italy.

VII. Damages

A. Compensation

The general standard relating to the amount of damages that are recoverable as a result of a breach of an express treaty violation is to be found in the *Chorzów Factory* case. In the decision on this case, the Court made the distinction between an ordinary, lawful taking of property, which would have only the payment of cash compensation for direct losses, and a wrongful taking which violated an express treaty obligation. The latter requires restitution in kind, or if that was impossible, payment of a sum that would effectively place the complainant in the situation in which he was before the illegal act was committed.

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law[1]."

The Court notes that if this distinction were ignored ". . . it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable, in so far as their financial results are concerned"[2].

In ELSI's case, it has been shown previously that the acts of the Government of Italy did violate Italian law, customary international law and a number of specific treaty provisions. Accordingly, Raytheon and Machlett are entitled to be placed in the same position in which they were prior to these illegal acts and omissions. ELSI's subsequent bankruptcy, the sale of much of its former property, and deterioration in value of the remainder of its former assets have obviously made this impossible. Thus, the only other available remedy is to award such money damages to Raytheon and Machlett as will accomplish the same result.

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[1] *Case concerning the Factory at Chorzów*, Judgment of 13 September 1928, *Series A, No. 17, PCIJ* 47.

[2] *Id.*

The amount of money that will achieve that purpose is $7,225,968 or 4,516.23 million lire at the conversion rate of 0.0016. This sum is broken down into various categories which are described in the sections that follow.

B. Payment of ELSI's Guaranteed Loans

As a result of the Government of Italy's illegal acts which precipitated ELSI's bankruptcy, ELSI lost the opportunity for orderly liquidation and the benefits of amicable settlements with all of its creditors. Thus, existing loans which a number of Italian banks had made to ELSI were not amicably settled. When the banks realized that ELSI could not pay these loans, they turned to Raytheon as the guarantor of some of them. Raytheon paid 5,629,481,667 lire on these guarantees. If the Government of Italy had permitted ELSI to proceed with an orderly liquidation, the proceeds from it would have enabled ELSI to have paid the banks 50 per cent (50%) of the total amounts due on lire 2,815 million on the guaranteed loans which Raytheon would not have had to pay. The portion of this cost which would have been paid from the proceeds of the orderly liquidation is one of the elements of damage to Raytheon which is a direct result of the unlawful acts of the Government of Italy. To reiterate, the amount of the claimants' damage in this connection is lire 2,815 million.

C. Suits Brought by ELSI's Unguaranteed Creditors

The illegal acts and omissions of the Government of Italy also caused Raytheon to be subject to groundless suits brought against Raytheon and Machlett by five Italian banks. The total amount claimed under these suits is lire 4,431,574,151.

The essence of these banks' claims is that Raytheon is the only shareholder in ELSI, and that it is responsible for the unsecured loans which the banks made to ELSI. Although Raytheon is not ELSI's only shareholder, and these claims are believed to be legally groundless, it is possible that the Italian courts may depart from their established precedents and hold Raytheon liable.

If the Government of Italy had not interfered with Raytheon's and Machlett's management and control of ELSI, and had not such interference prevented the orderly liquidation of ELSI, these suits would have been entirely avoided. The banks were willing to settle with ELSI for 30 to 50 per cent of the amounts claimed in the suits, and this amount would have easily been realized by them in an orderly liquidation. Once ELSI's assets were requisitioned and it was forced into bankruptcy, there was no longer any possibility of settlement, nor was there any likelihood that the actual value would be realized from the ELSI assets. Now, as a result, Raytheon is being sued for the total amount of these unsecured debts attesting, *inter alia*, to the fact that nothing can be expected as a dividend to the general creditors in the bankruptcy. It is now impossible to restore Raytheon's settlement opportunities with the banks, and Raytheon now must expend its own funds to defend itself against these groundless suits.

The total amount of lire 4,431,574,151 which these five banks may recover and amounts for Raytheon's defense of the suits are not included in the sum representing the amount of Raytheon's and Machlett's present claim against the Government of Italy. It is probable that Raytheon will succeed in defending against these groundless suits. If this is the outcome of the litigation, Raytheon will be entitled only to recover from the Government of Italy the amount it is out of pocket as a result of its defense of these suits. To the extent, if any, of recovery by the banks, Raytheon is entitled to full indemnity.

In order to place Raytheon in the same position in which it would have been had it not been for the acts and omissions of the Government of Italy in connection with ELSI, it is essential that the Government of Italy assume the responsibility for such suits which were instigated by its government-owned and controlled banks.

This portion of the damage is also supported by precedent. In fact, one of the precedents, the *Cerruti* case, may be found in the diplomatic history of the United States, Italy and Colombia. Cerruti was an Italian national who resided in Colombia where he engaged, among other things, in a business partnership which, under Colombian law, was a legal entity. As a result of a revolution, he fell into disfavor with the governing circles in Colombia. The Colombian Government seized his assets, including the assets of the partnership. Several lengthy arbitrations ensued, and the matter was placed before Grover Cleveland, President of the United States, for a settlement. Among other awards of damages, President Cleveland held the Government of Colombia responsible for payment of the debts of the partnership. The Government of Colombia objected, stating, among other things, that the amount claimed was indefinite, and therefore beyond the scope of the arbitrator's jurisdiction. In the heated diplomatic correspondence which followed, Italy flatly disagreed with the Colombian position. Before final resolution of the matter, Colombia paid a portion of the award to the Italian Government. Private law suits were brought against Cerruti in Italy attaching or purporting to attach this portion of the award in the hands of the Italian Government. Eventually, Colombia assumed responsibility for the suits, and was successful in settling with all of Cerruti's creditors, except for one who persisted. The matter was finally settled by an arbitral commission in Rome on 6 July 1911, with the arbitrators granting to the Government of Italy virtually all that it requested, including costs Cerruti had been required to incur as a result of defending private litigation in Colombia.

The Government of the United States asks no more in this connection than the Government of Italy requested for its national in the *Cerruti* case. It is obviously inequitable to seize the assets of a legal entity without regard to its liabilities. When this inequity affects the nationals of another State, the resulting damage is obviously a proper element of a diplomatic claim. Accordingly, although no definite amount is included in this claim in respect of the bank suits, the Government of the United States requests the Government of Italy to assume financial responsibility for payment of any judgment which may result and for Raytheon's costs in defending against such suits. The Government of the United States also reserves the right to reopen this claim at such time as amounts of such damage become ascertainable.

D. Raytheon's Open Accounts with ELSI

Also, as a result of the requisition, Raytheon was not able to recover the amount of 550,000,000 lire representing 50 per cent of certain open accounts it had with ELSI. If ELSI had been permitted to liquidate in an orderly fashion, Raytheon would have recovered this amount. Any hope of collecting on these accounts was vitiated by the requisition and subsequent acts of the Government. The forced sale of ELSI's plant, at a diminished price, and the reduction of the value of the rest of its assets to a fraction of the amount a skilled electronics firm could have obtained for them, assured that there would not be enough money to pay Raytheon anything on these accounts. Raytheon's damage in connection with this item, then, is lire 550,000,000.

E. Damage Resulting from the Legal, Accounting, Printing, and Other Expenses Incurred in Connection with This Claim

It has been long recognized in customary international law that a complainant is entitled to recover the costs in preparing his claim.

Since April 1968, Raytheon and Machlett have had large out of pocket expenses in connection with this claim. The claimants also will continue to incur further costs until the claim is settled.

Raytheon and Machlett estimate that the sum attributable to the hundreds of hours required of accountants, administrators and attorneys to prepare this claim is lire 600 million.

Considering the size and complexity of the claim and the many issues involved, the amount asked as reimbursement for costs is reasonable and should be paid by the Government of Italy.

International Arbitral Tribunals have long recognized that in circumstances like those involved in this claim, a claimant should be reimbursed for necessary costs in protecting his interests and in establishing his claim. The cases discussed below are typical.

A leading case on costs is the *Shufeldt* case (*United States v. Guatemala*) in which the United States Government claimed compensation in respect of loss of time of Shufeldt, injury to credit and grave anxiety of mind on account of the cancellation of the contract involved. The Arbitrator in his award stated:

> "Taking all the circumstances into consideration, that Shufeldt was suddenly thrown out of business and the time and expense incurred in endeavoring to come to a settlement with the Government of Guatemala and then in trying to get the United States Government to espouse his cause, I think it just and not excessive to allow $35,000.00 on this head." (II United Nations, *Reports of International Arbitral Awards*, 1083, 1101.)

In the case of *Robert H. May* (*United States v. Guatemala*), the Arbitrator, in awarding damages sustained on account of the wrongful rescission of a contract for the management and repair of a railroad, stated:

> "It has taken Mr. May just over two years to obtain a settlement of his claim against the Guatemalan Government. He has had to undertake journey upon journey to bring the matter before the United States Government and to induce them to intervene in his favor; he has had to engage, at heavy rates the services of eminent lawyers; whose reputation would insure a hearing from overworked officials, and whose opinions, based upon the stern logic of facts, would have weight with the legal advisers of his Government. Many of the leading witnesses were scattered over the face of the world, and May has had to undergo the expenses of reaching them. Owing to the unremitting attention exacted by the prosecution of his claim, he has been entirely debarred from seeking remunerative work, and his credit, which, on the showing of this Government, was so excellent as to cause his pay checks to be received as cash by all his neighbors, is nearly, if not entirely suspended until the decision of the arbitrator be known.
>
> On the foregoing grounds the arbitrator decides: . . .
>
> 5. That the Government of Guatemala will pay Mr. Robert H. May the sum of $40,000 gold by way of indemnity for expenses incurred, two years'

time lost, suspension of credit, and grave anxiety of mind." (*Foreign Relations of the United States 1900*, 648, 659, 673-674.)

In the *El Triunfo Company, Limited* case (*United States* v. *Salvador*) arbitrated under an agreement of 19 December 1901, the Arbitrators awarded damages for the destruction of property and the annulment of a concession and franchise and the following costs incurred by claimant:

Expenses incurred before intervention by the United States	$ 2,671.31
Attorneys' fees	$60,000.00
Other expenses of prosecuting the claim	$18,964.77
Total:	$81,356.08

(*Foreign Relations of the United States 1902*, 859, 862.)

In the *Walter Smith* case (*United States* v. *Cuba*) arbitrated pursuant to an agreement of 2 January 1927, the Arbitrator allowed the expenses claimant incurred in "defending his rights". The Arbitrator stated:

> "However, after taking into account all the testimony and documentary evidence, also the period of time during which the claimant has been deprived of the use of his property, approximately ten years, and the expense to which he has been put in defending his rights, the Arbitrator finds that, as compensation for the value of the land, of the buildings and personal effects contained therein, also the deprivation of the use of the property and in consideration of his expense in defending his rights, he should receive in complete settlement $190,000." (II United Nations, *Reports of International Arbitral Awards*, 915, 918.)

On many occasions arbitral tribunals have allowed claimants' costs without explanation. The following cases are typical: *John Baldwin*, Arbitration between the United States and Mexico, Convention of 11 April 1839 (4 Moore, *International Arbitrations*, 3235); *Patrick Cootey*, Arbitration between the United States and Mexico, Convention of 4 July 1868 (3 Moore, *International Arbitrations*, 2770); *The Louisa*, Arbitrations between the United States and Mexico under the Convention of 11 April 1839 (4 Moore, *International Arbitrations*, 4325.)

International tribunals sometimes refuse to allow costs. When they do so, there appear to be sound reasons for disallowance. For example, in the case of the *S.S. Wimbledon* (*France* v. *Germany*) which was decided by the Permanent Court of International Justice in 1923, certain expenses of the claimant were disallowed on the ground that they were not connected with the refusal of the passage of the vessel. (I Hudson, *World Court Reports* (1934), 180.)

The *Orinoco Steamship Company* case (*United States* v. *Venezuela*) is a very interesting example of this type of case. When this case was arbitrated under the Protocol of 1903, Umpire Barge disallowed a claim for counsel fees, stating in part:

> "But whereas the greater part of the items of the claim had to be disallowed;
>
> And whereas in respect to those that were allowed it is in no way proved by evidence that they were presented to and refused by the Government of the Republic of the United States of Venezuela, and whereas therefore the necessity to incur those fees and further expenses in consequence of an unlawful act of culpable negligence of the Venezuelan Government is not

> proved, this item has, of course, to be disallowed." (IX United Nations, *Report of International Arbitral Awards*, 180, 204.)

However, when the same case was presented to the Permanent Court of Arbitration at The Hague, pursuant to an agreement of 13 February 1909, the court allowed counsel fees and expenses of litigation, stating:

> "Whereas the claim of $25,000 for counsel fees and expenses of litigation has been disallowed by the umpire in consequence of the rejection of the greater part of the claims of the United States of America, and as by the present award some of these claims having been admitted, it seems equitable to allow part of this sum, which the tribunal fixes *ex aequo et bono* at $7,000 . . ." (Scott, *The Hague Court Reports* (1916), 226.)

Thus, it appears that the cases in which costs are disallowed actually support the rule that costs are a proper element of damages because the tribunals invariably point out that the costs have been disallowed because of some dereliction or failure on the part of the claimant. Such elements are not present in this claim and it would therefore appear that Claimant's costs should be allowed on the basis of the overwhelming weight of authority in his favor.

F. Interest

Simple interest computed at the rate of 5 per cent per annum has been included in the claim from the date of requisition of the ELSI property to 30 June 1971. Simple interest at the same rate from 30 June 1971 to the date the claim is paid, when such date has been ascertained, must also be included. Interest has been included because it is an elementary principle of international law that interest must be paid for the delay in payment of an obligation which has arisen from the taking of property and that interest should run from the date the property was taken to the date payment is made. International tribunals have usually awarded interest at more than 5 per cent per annum but 5 per cent only is asked in this claim because that is the rate prescribed by Italian law, and international tribunals as a rule award the rate in effect at the place where the loss or damage occurred.

As pointed out in other parts of this Brief, international tribunals in allowing compensation for international wrongs follow the simple principle that the object of compensation is to place the injured party in the same position he was in before the injury. It follows that the injured party is not put in the same position unless the compensation includes interest for delay in payment.

The reason for the allowance of interest is very simply stated in Administrative Decision No. III of the Mixed Claims Commission, United States and Germany. That Commission allowed interest at 5 per cent per annum on claims for property taken while the United States was a neutral. The Treaty of Versailles was silent on interest on such claims and the Treaty of Berlin, establishing the Commission, expressed Germany's obligation in terms of "compensation" or "reparation". The Commission stated:

> "Applying the principles announced in Administrative Decision No. II at pages 7-8, the Commission holds that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place. But as compensation was not made at the time of taking,

> the payment *now* or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation. This measure will be met by fixing the value of the property taken as of the time and place of taking and adding thereto an amount equivalent to interest at 5 per cent per annum from the date of the taking to the date of payment. This rule the Commission will apply in all cases based on property taken during the period of neutrality." (VII United Nations, *Reports of International Arbitral Awards*, 64, 70.) (Emphasis added.)

The United States-Mexican Claims Commission established by the Convention of 8 September 1923 allowed interest at 6 per cent on awards of the Commission. In its Opinion in the *Illinois Central Railroad Company* case the Commission said:

> "Unfortunately the convention of 8 September 1923, contains no specific stipulation with respect to the inclusion of interest in pecuniary awards. Allowances of interest have been made from time to time by international tribunals acting under arbitral agreements which, like the agreements of 8 September 1923, have made no mention of this subject. See for examples: treaty of 27 October 1795, between the United States and Spain, *Malloy*, Vol. 2, p. 1640; convention of 8 February 1853, between the United States and Great Britain, *ibid.*, Vol. 1, p. 664; convention of 25 November 1862, between the United States and Ecuador, *ibid.*, p. 432; convention of 4 July 1868, between the United States and Mexico, *ibid.*, p. 1128. Other agreements have contained stipulations authorizing awards of interest under specified conditions and for more or less definitely prescribed periods. See for examples: treaty of 19 November 1794, between the United States and Great Britain, *Malloy*, Vol. 1, p. 590; convention of 10 September 1857, between the United States and the Republic of New Granada, *ibid.*, p. 319; convention of 5 December 1895, between the United States and Venezuela, *ibid.*, Vol. 2, p. 1858; convention of 7 August 1892, between the United States and Chile, *ibid.*, Vol. 1, p. 185; special agreement of 18 August 1910, between United States and Great Britain, *Redmond*, Vol. 3, p. 2619. *None of the opinions rendered by tribunals created under those agreements with respect to a variety of cases appears to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation.* It is the purpose of the convention of 8 September 1923, to afford the respective nationals of the high contracting parties, in the language of the convention, 'just and adequate compensation for their losses or damages'. In our opinion just compensatory damages in this case would include not only the sum due, as stated in the memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld . . . In Hale's Report, page 21, it is stated that the Commission created by Article 12 of the treaty of 8 May 1871, between the United States and Great Britain 'ordinarily allowed interest at the rate of 6 per centum per annum from the date of the injury to the anticipated date of the final award'." (Emphasis added.) (IV United Nations, *Reports of International Arbitral Awards*, 134, 136.)

The Hague International Court of Arbitration in the case of *Russia* v. *Turkey* discussed interest at length. The court said, in part:

> "The tribunal is of the opinion that all interest-damages are always reparation, compensation for culpability. From this point of view all interest-damages are compensatory, whatever name they may be given. Legal interest allowed a creditor for a sum of money from the date of the demand in due form of law is the legal compensation for the delinquency of a tardy debtor exactly as interest-damages or interest allowed in case of an act of violence, of a quasi-act of violence or the nonfulfilment of an obligation are compensation for the injury suffered by the creditor, the money value of the responsibility of the delinquent debtor. Exaggeration of the consequences of civil-law distinctions in responsibility is the more inadmissible because in much recent legislation there appears a tendency to lessen or abolish the mitigation which the Roman law and its derivatives admitted in the matter of responsibility as to money debts. It is certain, indeed, that all culpability, whatever may be its origin, is finally valued in money and transformed into obligation to pay; it all ends, or can end, in the last analysis, in a money debt. The tribunal, therefore, cannot possibly perceive essential differences between various responsibilities. Identical in their origin — culpability — they are the same in their consequences — reparation in money.
>
> The tribunal is, therefore, of the opinion that the general principle of the responsibility of states implies a special responsibility in the matter of delay in the payment of money debt, unless the existence of a contrary international custom is proven. . . . The tribunal, for the reasons indicated above, is of the opinion, on the contrary, that there is no reason why the great analogy which exists between the different forms of responsibility should not be taken into account; this analogy appears particularly close between interest called *moratory* and interest called *compensatory*. The analogy appears to be complete between the allowance of interest from a certain date upon valuing the responsibility in money, and the allowance of interest on the principal determined by agreement and remaining unpaid by a delinquent debtor. The only difference is that, in one case, the interest is allowed by the judge, since the debt was not exigible, and in the other case, the amount of the debt was determined by agreement and the interest becomes exigible automatically in case of demand in due form of law." (7 *American Journal of International Law*, 178.)

International tribunals have consistently awarded interest from the date of the loss or injury to the date of the award. This is consistent with the principle that compensation, to "make the injured party whole", must include interest. Obviously then, interest must run from the date of injury. In the earliest arbitration in which the United States was a party (1794), the United States-British Commission awarded interest at 6 per cent per annum from the date of damage to the date of its awards (1 Moore, *International Arbitrations* (1898), 339-340, and 4 Moore, *International Arbitrations* (1898), 4318-4319). The Mixed Commission established under the Treaty of 27 October 1795 between the United States and Spain also awarded interest at the rate of 6 per cent per annum from the date of damage (III Whiteman, *Damages in International Law* (1943), 1867).

In the *Illinois Central Railroad* case (*United States* v. *Mexico*), mentioned above, the question of the allowance of interest was discussed at length by the Commission established thereunder. In that case, a claim was presented for $1,807,531.36, including interest amounting to $335,331.36 as of 1 April 1925, together with a proper allowance of interest thereon from 1 April 1925. This amount was claimed to be due in payment for 91 locomotive engines sold by the American company to the Government Railway Administration of the National Railways of Mexico under a written contract. In making an award, on 6 December 1926, the Commission allowed the unpaid principal sum of $1,472,200 and interest on the deferred payments under the contract up to 1 April 1925, amounting to $335,331.36, as well as interest at the rate of 6 per cent *per annum* on the sum $1,472,200 from 1 April 1925 to the date on which the last award should be rendered by the Commission. It stated:

> "... It is the purpose of the Convention ... to afford the respective national ... 'just and adequate compensation for their losses or damages'. In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld." (IV United Nations, *Reports of International Arbitral Awards*, 134, 136.)

In the *Orinoco Asphalt Company* case (*Germany* v. *Venezuela*) interest was allowed from the date of loss. Umpire Duffield said, in part:

> "In the absence of any testimony on which any definite appraisal of the value of the asphalt at the mines can be based, the claimant has not shown the actual amount of his damage. In the opinion of the umpire a fair, and perhaps the only, measure of damage is interest on the amount for which the product of the mines would have sold during the period of stoppage of traffic. Perhaps mathematical accuracy might require this interest to be calculated for the average time, but under all the circumstances of the case the umpire is of the opinion that it is just to allow interest for the entire period." (X United Nations, *Reports of International Arbitral Awards*, 424, 428.)

In the *Shufeldt* case (*United States* v. *Guatemala*), mentioned previously in this Memorandum, the tribunal allowed interest on the property taken and on prospective profits. The arbitrator stated:

> "Interest is also claimed by the United States Government. Shufeldt has been deprived of the use of his property — the income on his investment — for two years. This income on property I have assessed at $25,415 per annum and I think he is entitled in justice to compensation for the loss of such use. I therefore award an amount equal to six per cent on such income for two years, that is $4,575.10." (II United Nations, *Reports of International Arbitral Awards*, 1083, 1101.)

As pointed out above, the United States-German Mixed Claims Commission in Administrative Decision No. III allowed interest from the date of loss for property taken, damaged or destroyed.

From the foregoing it is abundantly clear that Italy is obligated to pay interest on this claim from the date the property involved was requisitioned to the date the claim is paid.

In the *Beckman and Company* case (*Germany* v. *Venezuela*, 1903), Umpire Duffield in allowing interest for delay in payment said, in part:

> "It is too clear to need argument that if no rate of interest is agreed upon by the parties only the legal rate [in Venezuela] can be allowed." (X United Nations, *Reports of International Arbitral Awards*, 436, 437.)

In the *Puerto Cabello and Valencia Railway Company* case (*Great Britain* v. *Venezuela*), Umpire Plumley in awarding interest at the "lawful rate" based his decision on the ground that the parties to the contract involved knew the lawful rate and were bound by it. Mr. Plumley said, in part:

> "But by the laws of Venezuela interest on overdue accounts may be allowed at 3 per cent when there is no agreement concerning interest in the contract. If interest is to be allowed here, it is on the ground that the claimant company has been without the use of certain sums of money of which use the respondent Government has had a corresponding benefit. Equity would require compensation for such use in order to secure a fair and perfect balance between the two parties. When the claimant company secured the concession and the guaranty it undoubtedly knew the lawful rate of interest in Venezuela when no rate was prescribed in the contract. If it were then unwilling to content itself with such lawful rate in case of default or delay of payment, it should have secured a stipulation for a more favorable rate. That it did not do this must be taken as sufficient proof that it rested content upon the lawful rate. Again, the respondent Government knew its lawful rate of interest at the time of entering upon such contract of guaranty, and in therein providing that all questions in dispute should be determined by its courts, where only the lawful rate could be considered and adjudged, it in effect secured a stipulation that both of the contracting parties were to abide by the lawful rate. . . ." (XI United Nations, *Reports of International Arbitral Awards*, 510, 526-527.)

In the *Hetty Green* case (*United States* v. *Mexico*), the Commission established under the Convention of 11 April 1839 awarded interest at 6 per cent per annum on the principal amount awarded, "that being the legal rate of interest in Florida at the time of the advances" (III Whiteman, *Damages in International Law*, 1978). The same Commission allowed 6 per cent interest in a case which arose in the state of Louisiana because that was the legal rate in that state (III Whiteman, *Damages in International Law*, 1979).

On the basis of the foregoing cases and many similar cases, it is settled in international law that in order fully to compensate the claimants, interest should be paid from 1 April 1968, the date of the requisition, to the date the claim is paid, at the rate of 5 per cent per annum, the applicable legal rate in Italy.

Summary of Legal Arguments

I. The principles of customary international law and the applicable Treaty provisions govern consideration of this claim.

II. The taking of the assets of ELSI (an Italian corporation whose shares were owned by the American claimants) without payment of compensation therefore, violated customary international law and the US-Italian Treaty of Friendship, Commerce and Navigation, as supplemented (FNC Treaty)

A. Customary international law prohibits the taking of the property of a foreigner without the payment of prompt, adequate and effective compensation, as does Article V, paragraph 2, of the FNC Treaty. This rule applies to all of the rights and interests held directly or indirectly by the claimants in ELSI, particularly in view of paragraph 1 of the FNC Treaty Protocol.

B. Article I of the FNC Treaty Protocol proscribes the arbitrary or discriminatory prevention of American corporations from controlling and managing enterprises they have been permitted to establish or acquire in Italy. The seizure of

ELSI's assets prevented the claimants from exercising any control or management over ELSI in violation of this Treaty provision.

C. Arbitrary or discriminatory impairment of the claimants' rights, interests, and investments in ELSI are prohibited by Article I of the FNC Supplement. The seizure of ELSI's assets, particularly without the assumption of any responsibility for ELSI's liabilities, impaired the claimants' rights and interests, and all of their investments in ELSI to the extent that the Italian company was forced into bankruptcy, and the claimants' rights, interests and investments therein were obliterated.

D. Article VII of the FNC guarantees the claimants the right to acquire and freely dispose of real and personal property in Italy. Seizure of ELSI's assets and other measures taken by governmental officials clearly violated this treaty provision. It was impossible for the claimants or their Italian corporation to dispose of any of ELSI's assets, and even the Curator in ELSI's bankruptcy had had no choice but to sell them to a government-controlled corporation.

E. Article VI of the FNC Treaty provides that ELSI's facilities in Italy shall not be subject to unlawful entry or molestation. Such facilities were seized by the Government and occupied by ELSI workers in violation of the Treaty provisions and Italian law.

III. Paragraph 2 of the FNC Protocol and Article V of the FNC Supplement assure the claimants' enterprises in Italy certain rights and privileges and other advantages to be enjoyed by industry in the Mezzogiorno. These rights, privileges and advantages were withheld from ELSI.

IV. The Government of the United States has standing to present this claim on behalf of its American corporate nationals as shareholders of ELSI.

A. Under any test recognized by international law (siége, social, genuine link or situs of incorporation) the claimants are American nationals.

B. The Government of the United States has standing to present this claim on the basis of the claimants' shareholder interest in ELSI.

> 1. Customary international law has long recognized the right of a government to present claims in respect of damage to a foreign corporation in which its nationals have a substantial interest. Raytheon and Machlett owned all of the ELSI stock. Also, as a result of the acts and omissions of the Government of Italy ELSI is defunct and bankrupt, and a corporation of the respondent's nationality, factors which further solidify standing of the United States to present this claim.
>
> 2. The FNC Treaty is clear in a number of its provisions in giving the United States standing to present a claim on behalf of its shareholder nationals. Paragraph 1 of the FNC Treaty Protocol, for example, provides protection of property interests held directly or indirectly. Such a provision, from its plain meaning, but more particularly when studied in the perspective of the use of its terms in customary international law, clearly covers all of the claimants' interests in ELSI, including its shareholder interests.

V. The claimants have exhausted their local remedies in Italy. ELSI immediately appealed the requisition of its property. Over one and one-half years later the requisition was held to have been illegal. Prompt overturn of the requisition was the only remedy which would have averted the claimants' damage. They have no standing, as ELSI stockholders, to sue the Government of Italy on the facts which support the claim.

OPINIONS REFERRED TO IN MEMORANDUM OF LAW IN SUPPORT OF THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.p.A.

[See infra, *Reply of the United States, Annexes 3 and 4]*

THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED, AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.p.A.

Exhibits I-1 through III-25

I-1. CERTIFICATE OF INCORPORATION OF RAYTHEON COMPANY [AS AMENDED]

[Not reproduced]

I-2. RAYTHEON CERTIFICATE OF GOOD STANDING

[Not reproduced]

I-3 TO I-31. DOCUMENTATION OF CITIZENSHIP FOR OFFICERS OF RAYTHEON

[Not reproduced]

I-32 TO I-39. DOCUMENTATION OF CITIZENSHIP OF DIRECTORS OF RAYTHEON

[Not reproduced]

I-40. MACHLETT CERTIFICATE OF INCORPORATION

[Not reproduced]

I-41. MACHLETT CERTIFICATE OF GOOD STANDING

[Not reproduced]

I-42 TO I-46. DOCUMENTATION OF CITIZENSHIP OF OFFICERS OF MACHLETT

[Not reproduced]

I-47 TO I-49. DOCUMENTATION OF CITIZENSHIP OF DIRECTORS OF MACHLETT

[Not reproduced]

I-50. SECRETARY'S CERTIFICATE WITH RESPECT TO OWNERSHIP OF MACHLETT SHARES

[Not reproduced]

I-51. FIRST NATIONAL CITY BANK CONFIRMATIONS OF ELSI SHARES HELD FOR RAYTHEON AND FOR MACHLETT

[Not reproduced]

1-52. ELSI's Confirmation to Lybrand of Its Capital Structure and Shareholders

Palermo, 22.1.1968

Dear Sirs,

After having examined Raytheon-ELSI's official books, we hereby certify and confirm the following:

1. The total capital of Raytheon-ELSI S.p.A. on 31 December, 1967, was of Lit. 1,500,000,000.
2. On that date the aforesaid capital was divided into 1,500,000 shares as follows:

    750,000 ordinary shares of 1,000 lire each, marked "A",
    750,000 preference shares of 1,000 lire each, marked "B".

    Preference shares marked "B" enjoy priority in the distribution of the assets of Raytheon-ELSI up to their par value in the event of apportionment of such assets to the stockholders. Furthermore they may be converted into ordinary shares marked "A" upon request of the shareholders.

    Machlett Laboratories Inc. appears as the registered owner of 33,750 ordinary shares marked "A"; Raytheon Company appears as the registered owner of 1,466,250 shares. The following is a breakdown of the certificates registered in the name of Raytheon Company:

Certificate number	*Number of shares*	*Par value of shares*
1	200 shares "A"	200,000
2	200 shares "A"	200,000
3	200 shares "A"	200,000
4	200 shares "A"	200,000
5	200 shares "A"	200,000
6	200 shares "A"	200,000
7	200 shares "A"	200,000
8	200 shares "A"	200,000
9	200 shares "A"	200,000
10	200 shares "A"	200,000
11	200 shares "A"	200,000
12	200 shares "A"	200,000
13	200 shares "A"	200,000
14	200 shares "A"	200,000
15	463,850 shares "A"	463,850,000
17	249,600 shares "A"	249,600,000
18	750,000 shares "A"	750,000,000

3. Certificates 1, 2, 3, 4, 5, 6, 7, 8 and 9 are held as surety for the directorship of Mr. J. D. Clare (1), Mr. Aldo Profumo (2), Mr. J. J. Stobo (3), Mr. H. L. Bianchi (4), Mr. J. A. Scopalliti (5), Mr. C. L. Calosi (6), Mr. F. Ruta (7), Mr. A. Lodolo D'Oria (8) and Mr. A. Rovelli (9). These certificates are filed at Raytheon-ELSI, Via Villagresia No. 79, Palermo.

    Certificates 10, 11, 12, 13, 14, 15, 17 and 18 are deposited in the name of Raytheon Company with Credito Italiano, Palermo.
4. Furthermore, please be informed that Raytheon-ELSI has obtained the prescribed authorization by the Ministry and has successfully accomplished all legal formalities. Therefore, the Board of Directors, during the meeting which is going to be held sometime in February next, will approve the increase of

the Company capital from Lit. 1,500,000,000 to Lit. 4,000,000,000. The increase will be made by issuing No. 2,500,000 shares, divided as follows:

1,250,000 ordinary shares of 1,000 lire each, marked "A";
1,250,000 preference shares of 1,000 lire each, marked "B".

Raytheon Company will purchase the entire stock of shares.

The operation will be carried out by turning the credit of Lit. 2,500,000,000 claimed by Raytheon Company from Raytheon-ELSI into No. 2,500,000 shares of 1,000 lire each.

(*Signed*) C. POLIZZOTTO,
(Secretary General).

(*Signed*) J. B. MAZZOTTI,
(Administrative and Financial Manager).

II-1. MANUFACTURING AND SALES AGREEMENT BETWEEN RAYTHEON MANUFACTURING COMPANY, WALTHAM, MASSACHUSETTS, USA, AND FABRICA ITALIANA RADDRIZZATORI APPARECCHI RADIOLOGICI, GENOA, ITALY

[Not reproduced]

II-2. TEXT OF INCEPTION AGREEMENT OF 21 OCTOBER 1955

[See I, *Memorial of the United States, Annex 11]*

II-3. NOVATION AGREEMENT TRANSFERRING MANUFACTURING LICENCE TO ELSI

[Not reproduced]

II-4. INVESTMENT HISTORY

(Lire in millions)

		Raytheon		*Machlett*		*La Centrale*		*SOFI*		*FIRAR*		*Total*	
1956	April					+495	+66%	+150	+20%	+107	+14%	} +750	
	May	+105	+14%							−105	−14%	} 750	
1959	January	+70				+330		+100				+500	Recapitali-
		175	14%			825	66%	250	20%			1250	zation
	October					+250	+20%	−250	−20%				
		+200	+16%			−200	−16%						
		(75)				(175)						(250)	Devaluation
		300	30%			900	70%					1000	
1961	August	+190	+19%			−190	−19%						
		490	49%			510	51%						
	November	+490				+510						+1000	Recapitali-
		980				1020						2000	zation
1962	December	+1600	+11%			+700	−11%					+2300	Recapitali-
		2550	60%			1720	40%					4300	zation
1964	Third Quarter	(1380)				(920)						(2300)	Devaluation
		1200				800						2000	
	December	+2000	+20%				−20%					+2000	Recapitali-
		3200	80%			800	20%					4000	zation
1967	Second Quarter	(2000)				(500)						(2500)	Devaluation
	April	+266.25	+17.15%	+33.75	+2.25%	−300	−20%						
		1466.25	97.75%	33.75	2.25%							1500	
		+2500	+1.91		−1.41							+2500	Recapitali-
		3966.25	99.66%	33.75	0.84%							4000	zation
	Cumulative Investment in Equity	7421.25		33.75		1595						9050	
	Guarantees:												
	Banca Nazionale del Lavoro	2140											
	Banca Commerciale Italiana	2000											
	Banco di Roma	130											
	Banco di Sicilia	840											
	Total	5110											

II-5. SETEL AGREEMENT

This Agreement entered into at Waltham, Massachusetts, as of the 2nd day of January 1960, by and between Raytheon Company, a corporation organized and existing under the laws of the State of Delaware, United States of America, having a principal office at Waltham, Massachusetts, USA (hereinafter called "Raytheon"), and Société Européenne de Téléguidage, société à responsabilité limitée au capital d'un million de nouveaux francs français, organized and existing under the laws of the Republic of France, having a principal office at Paris, France (hereinafter called "Setel").

Witnesseth:

Whereas, the Governments of the Federal Republic of Germany, the Kingdom of Belgium, the Republic of France, the Republic of Italy and the Kingdom of the Netherlands (hereinafter called the "Participating Governments") have established, and the North Atlantic Council has noted, approved, and adopted the establishment of the Nato Hawk Production Organization, consisting of a Board of Directors and the Nato Hawk Management Office (agent of the Board of Directors) as a Nato subsidiary body within the meaning of the agreement on the status of the North Atlantic Treaty Organization signed at Ottawa on 20 September 1951, to direct and supervise the Nato Hawk program; and . . .

. . . authorities, then Raytheon agrees, when requested by Setel, to negotiate with Setel with respect to the licensing of a suitable firm in a Participating Country having the approval of the Nato Hawk Production Organization for the production of such Common Item in the said country.

(D) If the Board of Directors of the Nato Hawk Production Organization shall elect to allow to be given to Elettronica Sicula (ELSI) an order, on the same terms and conditions as are offered by Setel to subcontractors and are accepted by them and at reasonable prices in the light of the quantities offered and for reasonable delivery schedules, to manufacture a quantity of the magnetrons now or hereafter used in Hawk which is within the capabilities of ELSI, and thereafter such Organization shall desire a second source for such magnetron or magnetrons other than Compagnie Générale de Télégraphie sans Fil with which Raytheon already has licence agreements with respect to magnetrons, one relating to technical assistance and one to patents covering magnetrons, Raytheon shall negotiate an agreement with any concern acceptable to Raytheon which is selected by Setel with the approval of the Nato Hawk Production Organization with respect to technical assistance and patents, making available technical assistance to such concern to the same extent as is provided in paragraph 1.02 and for a patent licence with respect to the production of such magnetron.

In the event that such source and Raytheon cannot agree as to the terms of such agreement, Raytheon shall grant to such source, and shall be deemed to have hereby granted, a patent licence for the production, maintenance and operation of Hawk at a royalty rate of 4 per cent based upon the sales price of such magnetrons determined in accordance with the provisions of paragraph 4.10 (B) upon sales of such magnetrons for the Nato Hawk Program.

Raytheon warrants that, if ELSI is provided in timely fashion with test and ageing equipment comparable to that supplied to Raytheon as Government Furnished Equipment for the test and quality control of magnetrons made by Raytheon for Hawk, either

(1) ELSI shall, if given timely orders therefor, produce magnetrons for Hawk of a quality equal to those magnetrons produced for Hawk by Raytheon on an adequate delivery schedule and at a price not greater, in the light of the quantities ordered and the stage of production, than the US prices charged the United States Government by Raytheon for the same magnetron and Raytheon shall exercise its best efforts to bring about such production by ELSI, or

(2) Raytheon shall, if ELSI is in default or threatens to be in default on such orders, assume ELSI's obligations, under the orders placed therewith and deliver said magnetrons, at a price which shall be the lower of *(a)* the ELSI price or *(b)* at a price not greater than the price at the time of such assumption being charged the United States Government by Raytheon for domestic delivery for the same magnetron, adjusted for differences in quantity.

Raytheon shall grant under its patents, know-how and information to Setel and/or to the NPCs or the concern or the concerns selected by Setel for the manufacture of the items listed in Exhibit A, for the Nato Hawk Program, the right to make, use and incorporate such items in the Hawk Missile System in the Participating Countries and to sell such items as a part of the Hawk Missile System both in the Participating Countries and outside of such countries to the full extent Raytheon may do so without incurring liability to others than to the subcontractors listed in Exhibit A. Furthermore, Raytheon shall cause those of its subcontractors listed in Exhibit A, who are selected pursuant to paragraph 1.03 to render assistance with respect to the items listed in Exhibit A, to grant under their respective patents, know-how and information to Setel and/or to the NPCs or the concern or the concerns selected by Setel for the manufacture of the items listed in Exhibit A, for the Nato Hawk Program, the right to make, use and incorporate such items in the Hawk Missile System in the Participating Countries and to sell such items as a part of the Hawk Missile System both in the Participating Couatries and outside of such countries to the full extent that the said subcontractors may grant such rights without incurring liability to others.

The grant or grants referred to above in this paragraph 2.08 shall not, however, extend to Common Items, other than . . .

II-6. RADARANGE LITERATURE

[Not reproduced]

II-6A. UNION-MANAGEMENT ACCORD ON LAY-OFFS

[Italian text not reproduced]

IX. INTERORGANIZATIONAL AGREEMENT OF 5 MAY 1965 ON LAY-OFFS FOR PERSONNEL CUTBACKS

between the General Confederation of Italian Industries; the Intersind Trade Association; the ASAP — Association of Petrochemical Industries operating with State participation;

and the General Italian Labour Union; the Italian Confederation of Union Workers; the Italian Workmen's Union;
between the General Confederation of Italian Industries; the Intersind Trade Association; the ASAP — Association of Petrochemical Industries operating with State participation;
and the CISNAL — Italian National Confederation of Union Workers;
between the General Confederation of Italian Industries; the Intersind Trade Association; the ASAP — Association of Petrochemical Industries operating with State participation;
and the CISAL — Italian Autonomous Confederation of Union Workers.

The participating organizations arrive at the formulation of this agreement with the intent to provide for a suitable instrument which, being conducive to co-operation between the respective organizations and the member industries represented, would contribute to a peaceable solution of possible differences in labour relations due to lay-offs. This is in consideration of situations where excess personnel would have a negative effect on production cost jeopardizing the position of the business while on the other hand the lay-off of such personnel would create social problems especially in areas of high unemployment.

This agreement establishes a conciliative procedure the scope of which is understood to be aimed at and limited to the specific objectives of the agreement proper and which, should there be lacking reconcilement, does not in any way limit the rights or capabilities of the parties hereto.

Article 1. Corporate management, whenever it sees the necessity of reducing the number of workers employed for the purpose of cutting back or converting the business or the shop operation, will so advise, the regional labour organizations, sufficiently in advance and through the appropriate union local, to permit implementation, where applicable, of the procedure outlined below; it will indicate the reasons, the number of workers to be involved in the layoff, and the effective date.

Companies employing more than 100 workers, and planning the suspension of operations for more than 30 days affecting more than 20 per cent of the work force or even 500 or more employees, will advise the appropriate labour organizations through the union local concerned, indicating the reasons, number of workers involved, and expected duration of the layoff.

Article 2. The regional labour organizations can ask the industrial association concerned, within seven days of notification of the situation per first paragraph of the preceding article, to meet with them for examining the reasons for the intended personnel curtailment on the basis of the information provided by the company concerned and any realistic, concrete possibility to avoid the layoff entirely or in part perhaps by transfers within the company without, however, constituting a non-productive burden for the company.

If such a meeting is not requested within seven days, the action can take place without delay. If, however, one of the labour organizations requests the meeting, the latter must be held within the following five days.

The procedure covered in this agreement must be consummated within 25 days from the date of notification of the labour organizations per Article 1 above.

If the company justifies its intended action with a technological conversion or reorganization or the labour organizations unanimously recognize such a situation, the deadline given in the preceding paragraph will be extended by two weeks.

The reconciliation procedure between the union organizations must be unconditionally carried out within the time-limits specified in this agreement, with the understanding that the company will suspend any layoff action until the said deadlines have expired or until it is found by all concerned that reaching agreement within the said time-limits is impossible.

In the meeting mentioned above, the employers' associations and the workmen's unions can avail themselves of the assistance of representatives of the company concerned and, respectively, of the Internal Commission or one of its representatives.

Both in the case of agreement and in the event of non-agreement, the company, determining which workers are to be laid off, will follow these comparative criteria: technical and productivity requirements; seniority; family-care considerations.

Article 3. The procedures according to this agreement relate to operations normally employing more than ten workers. For facilities having a union Representative in management, the procedure established in this agreement is limited to a conciliative review between management and the said Representative. In the other operations with up to 100 workers, the time-limit for the review of the planned lay-off as per Article 2 above is reduced to two weeks.

Article 4. The parties hereto agree that workers laid off for personnel reduction will receive, apart from the severance pay provided for in collective contracts, a flat allowance for an initial period of unemployment.

This allowance will be paid out by way of an insurance organization governed by appropriate legislation and controlled along guidelines for which the parties hereto will submit specific proposals to the cognizant authorities.

Formal declaration:

The organizations of the two parties hereto, prepared to implement the provisions of Article 4 above, hereby declare that they do not intend to make any changes regarding the points so far covered.

Article 5. The layoffs effected for personnel reduction are indeed motivated by no other considerations, and the workers involved have the right to be rehired by the same company if the latter does any hiring within a year's time for functions or specialized jobs previously held by the personnel laid off. In this case the rehiring will be made, under observation of objective criteria, in the reverse order of the layoffs.

Article 6. The stipulations of this agreement do not apply to layoffs due to the expiration of term contracts, or contracts for specific building construction work, or for seasonal or irregular jobs.

Article 7. This agreement becomes effective on 1 June 1965 and will be valid until 31 December 1968, to be automatically extended from year to year unless cancelled by one of the participating organizations at two months' notice prior to the original or the extended expiration date.

Explanation *re* Articles 1 and 2:

The notifications according to Articles 1 and 2 are to be given by the regional industrial association to the . . . organizations, on an equal level (union labour exchange or labour offices), except if the industrial association's territorial limits of responsibility are different in which case the notifications will be given to the corresponding labour organizations wherever they are located.

Explanation *re* Article 6:

In consideration of the particular importance or frequency of specific single jobs in the building industry it should be explained that the concept of specific jobs in the said industry also covers gradual completion of single phases of work which require the successive utilization of workers of different qualifications.

Statement *re* Articles 2 and 3:

With reference to the provisions of Articles 2 and 3 governing the action to be taken by the company in the different hypothetical cases considered in the paragraphs of the said Articles, it is to be understood that the notification of layoff and the time-limit for advance notice in respect of individual workers become effective as from the completion of the procedure outlined in the said paragraphs.

Statement *re* Article 2:

In the hypothetical case where an agreement is reached relative to the number of personnel to be laid off, the labour organization may examine the list of the employees affected for the purpose of pointing out individual cases where possible re-examination and substitution of others may be justified on the basis of the criteria per last paragraph of Article 2, without such re-examination being allowed, however, to delay the action by the company.

Read, confirmed and signed.

COMMON DECLARATION

The parties hereto, convinced of the need to pursue greater and more efficient utilization of the work force for the purpose of economic and social development, and aware of the importance as well as the delicate nature of employment problems, stress the necessity to jointly examine the circumstances surrounding personnel reductions for identifying their causes, for helping to limit their negative impact and, by common agreement, to come up with satisfactory solutions acceptable to the public authorities.

The parties hereto therefore agree:

(a) to periodically examine, between them, the employment situation on a national level, in general and for the individual sectors of industry, for the purpose of gathering the greatest possible amount of current information and projections regarding employment problems resulting from conjunctural economic situations and from general technological progress;

(b) to bring the results of the above examinations to the attention of public authorities either for a possible further analysis or for a decision and action by the public authorities themselves, and also for an improvement of the instruments of income support for the workers affected by the personnel reductions as well as those for job training.

For the purpose of implementing point *(a)* above the parties hereto agree that the examination of employment problems is the responsibility of the Confederations assisted, in matters pertaining to specific sectors, by the respective national trade unions in the industries concerned.

The objective of such an examination, besides determination of the nature, characteristics and problems of employment conditions, is the formulation of near-term and medium-range working plans.

For the implementation of point *(b)* above, and for arriving at a co-ordinated and rational employment policy with efficient collaboration between government authorities and professional organizations, the parties hereto entreat the following:

Establishment, on a national level, of a suitable ministerial entity for handling general and specific employment problems and for instituting, on consultation with the parties hereto and with the cognizant local agencies where necessary, whatever steps are appropriate;

Upgrading of the Compensation Service to permit better classification of all cases, extension of benefits on behalf of workers laid off in personnel cutbacks as provided for in the respective interorganizational agreement, and improved, faster handling;

Stepped-up efforts to retrain personnel in the case of reorientation or technical reorganization either of an individual company or an entire sector of the industry, under co-ordination of the public resources available for that purpose on a national or international level.

II-7. IRI CHART

[Not reproduced]

II-8. BANCO DI SICILIA BULLETIN

[Italian text and English translation not reproduced]

II-8A. PRESS CLIPPINGS ON IRI TAKEOVER

[Italian text and English translation not reproduced]

II-9. TEXT OF TRANSPORTATION SUBSIDY LAW

[Italian text not reproduced]

EXCERPT FROM *LEX*, PART I, PAGE 1718

Decree by the Ministry dated 29 March 1967 (in *Official Gazette* No. 171 of 10 July 1967), on the Reduction of Maritime Shipping Rates in Accordance with Article 15 of Legislative Act No. 717 of 26 June 1965.

In concurrence with the Minister for Special State Participation in (the development of) Southern Italy and with the Minister of Finance, the Minister for the

Merchant Marine, in consideration of Article 15 of Law No. 717 of 26 June 1965, decrees the following:

Article 1. For ocean-freight transportation, between national ports, of raw materials and semifinished goods consigned directly to industrial facilities operatively established and located within the Mezzogiorno (Southern Italy), and intended for direct use by these facilities in their production work, a 5 per cent reduction applies to all standard freight rates and tariffs excluding embarkation, unloading and insurance charges, as stipulated under the provisions of the agreements outlined below.

An analogous rate reduction also applies to the transportation of merchandise produced by industrial facilities operatively established and located within the Italian Mezzogiorno and shipped to locations outside the Mezzogiorno.

EXCERPT FROM *PROVVEDIMENTI LEGISLATIVI*, PAGE 1179

Article 15

Reduction of Tariffs for Maritime and Rail Transportation

The rail freight tariffs established in the second paragraph of Article 7 of the legislative decree No. 1598 (1) of 14 December 1947 issued by the provisional government and ratified by law No. 1482 (2) of 29 December 1948, also apply to the movement of materials and machinery required for the modernization of industrial facilities. Analogous benefits apply to the transportation of raw materials and semifinished goods needed in the production process and for industrial conversions, as well as for transporting to destinations outside the Mezzogiorno finished products of industrial companies located within the said territory.

The rail freight rates referred to in the first paragraph also apply to agricultural and related products.

Analogous reductions are permitted for transportation by ocean vessels, scheduled or otherwise, including vehicle ferries.

EXCERPT FROM *PROVVEDIMENTI LEGISLATIVI*

Decree by the Ministry dated 29 March 1967 (in *Official Gazette* No. 172 of 11 July 1967), on the Reduction of Maritime Shipping Rates in Accordance with Article 15 of Legislative Act No. 717 of 26 June 1965.

In concurrence with the Minister for Special State Participation in (the development of) the Mezzogiorno (Southern Italy) and with the Minister of Finance, and in consideration of Article 15 of Law No. 717 of 26 June 1965, the Minister for the Merchant Marine decrees the following:

Article 1. Ocean freight of merchandise referred to in the second paragraph of this Article, between national ports and destinations within the territory outlined in Article 3 of Law No. 546 (1) of 10 August 19 .. (?) as amended and under the provisions of Article 1 of Law No. 717 (1) of 26 June 1965 and subsequent articles, shall be subject to a reduction of 5 per cent on the standard freight rates and tariffs excluding embarkation, unloading and insurance charges. For shipments handled by the state-subsidized shipping line such rate reduction applies to the standard tariffs of the same; for shipments handled by independent carriers the rate reduction is governed by the provisions of Articles 5, 6, 7 of this decree.

The benefits according to the preceding paragraph apply to construction and building materials, machinery and any other items required for the original construction, the reconstruction, the conversion, the expansion and the modernization of *(a)* operatively established industrial facilities, *(b)* any other shop operation and supportive system within the premises of the said facilities.

* * *

II-10. Text of 30 Per Cent Procurement Law (Excerpts)

[Italian text not reproduced]

Paragraph 915. Legislative Act (Decree) No. 40 by the Provisional Government, dated 18 February 1947, on Supply and Job Contracts reserved by Government Agencies for Industries of the Mezzogiorno. (Published in the *Official Gazette* No. 51 of 3 March 1947.)

Article 1. For a period of 10 years from the effective date of this decree the agencies of the Italian Government are authorized to reserve for industries in the regions of Lazio, Campania, Basilicata, Calabria, Puglie and Sicily, supply and job contracts valued at not less than one-sixth of the total project amount.

Paragraph 983. Legislative Act No. 835 of 6 October 1950, on Supply and Job Contracts reserved by Government Agencies for Industries of the Mezzogiorno and the Lazio Region, and Definition of the Mezzogiorno (Southern Italy) and Insular Italy. (Published in the *Official Gazette* No. 245 of 24 October 1950.)

Article 1. The agencies of the Italian Government are *required* to reserve supply and job contracts referred to in legislative Act No. 40 (1) of 18 February 1947, for the industries, including small businesses and artisan shops, in the provinces of Lazio, Abruzzo, Molise, Campania, Lucania, Puglie, Calabria, Sicily, Sardinia and the Isle of Elba. The same requirement applies to the Administration of the national railroad system and of the Navy, relative to contracts referred to in legislative Acts No. 374 of 14 June 1945 and No. 503 (2) of 15 November 1946.

Article 16. Reservation of 30 per cent of Supply and Job Contracts by the Public Sector. Notwithstanding the provisions of Law No. 835 of 6 October 1950, and except where more favourable terms are contained in other laws now in force, the percentage of supply and job contracts stipulated in the said Law No. 835 is hereby increased to 30 per cent in favour of industries and artisan shops located in the territories outlined in Article 3 of Law No. 646 of 10 August 1950 as amended.

The same percentage also applies to the territories indicated in Article 1 of Law No. 835 (3) of 6 October 1950 as amended.

* * *

II-11. ANDREOTTI'S SPEECH OF 25 JULY 1968

[Italian text and English translation not reproduced: for another English translation, see I, *Memorial of the United States, Annex 46]*

II-12. CORRESPONDENCE WITH FIAT

3 August 1967.

Mr. John D. Clare
Vice President — Raytheon Europe
President — Raytheon ELSI S.p.A.
Via Ferdinando di Savoia, 6
Rome.

Dear Mr. Clare,

Thank you for your letter of July 31. The conversations with your people were certainly of interest to us, and we appreciated the opportunity afforded by their recent visit here.

Fiat positively intends to get a foothold in the field on a scale larger than is now the case with our Aviation activities. We shall need time, however, to explore the possibilities and do the required study work. We plan to do this by steps over the next three months or so, and in a context that includes also other contacts we already have.

Anyway, we shall welcome the honour of a visit from your distinguished Chairman of the Board Mr. Charles Adams, during his trip to Italy in the first half of September. I look forward to hearing further about his schedule through your Mr. Bianchi, to make sure I am available to meet your Chairman personally.

(Signed) G. BONO.

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31 July 1967.

Dr. Gaudenzio Bono
Managing Director
FIAT S.p.A.
Corso Marconi, 10
Torino

Dear Dr. Bono,

I have now received the report from Messrs. J. Stobo, A. Profumo and R. Bianchi of their meeting with you in Turin last Wednesday 26th July. We were encouraged to arrange this meeting following our last discussions with the Hon. La Leggia of ESPI and Dr. E. Carbone, General Manager of the Ministry of Industry and Trade, with whom we have been discussing the Raytheon-ELSI situation and plans. The Hon. La Leggia told us that on Tuesday 24th ESPI would be having discussions with FIAT both over the car assembly plant in Sicily and over the situation in Raytheon-ELSI, with a view to your joining ESPI and ourselves as part of a joint activity related to Raytheon-ELSI.

We felt that it was important that you had the opportunity to really understand our view of our new philosophy in ELSI, what we are actually doing and what we are trying to do, and hence we were very pleased to follow up the Hon. La Leggia's suggestion that we should contact FIAT directly for this purpose. I hope that the meeting was satisfactory from your point of view in providing this information.

From the reports of the Raytheon-ELSI people it would appear that you are considering further possibilities as a result of the meeting and I presume as a result of your meeting with ESPI. I understand that it was left with you to contact Mr. R. Bianchi in Rome for information to enable you to consider these possibilities. I am sure you will realize that we are dealing with a very dynamic situation and that the recent Raytheon Management activity, coupled with Raytheon planning for the future, is not at all reflected in the present balance sheet for instance, which is necessarily more of a historical document.

With the appropriate partners in Sicily, we are enthusiastic about the future possibilities and feel it would be well worthwhile to produce for you an additional note summarizing our proposals to ESPI, our present activities and our future plans, and to have this available with any other information that we pass on to you. When this is ready I think it would be very worthwhile if we could have the opportunity to discuss it with you. I am expecting that Mr. Charles Adams, the Chairman of the Board of the Raytheon Company, will be in Italy during the first two weeks of September, so perhaps this would be an appropriate time to try to arrange these discussions. I will ask Mr. Bianchi to contact your office in the very near future to see if a mutually convenient date can be arranged.

(*Signed*) John D. Clare,

Vice President — Raytheon Europe
President — Raytheon-ELSI S.p.A.

II-13. Minutes of Meeting with IRI of 4 January 1968

[See also I, *Memorial of the United States, Annex 15, Exhibit C]*

MEETING OF IRI-RAYTHEON — 4 JANUARY 1968

SUMMARY OF KEYPOINTS

Comments by Dr. Medugno of IRI

1. IRI have looked at the new study presented by Raytheon and have come to the same conclusions as those reached by Finmeccanica in the previous study.

2. There are no new factors as compared to one year ago.
3. There are still sizeable losses coupled with reduced sales levels.
4. The 6 billion lire capital requested can only be used to reduce the debt and hence reduce the interest expense.
5. The investment in plant and equipment during recent years is lower than the depreciation. The money is, therefore, not needed for working capital.

Hence IRI see no purpose in participating and really no point in discussing the possible new product situation.

Mr. Clare's answers to Dr. Medugno's initial comments

Comment No. 2. There have been very significant changes in the company performance, management support and product policy as outlined in detail in the last two reports. There is factual evidence to strongly refute this comment No. 2.

Comment No. 3. JDC reviewed product line by product line — as given in the reports — to show that we consider stabilization and growth is possible with a suitable Italian partner.

Comments No. 4 and 5. Large past losses produce a large debt equity ratio which eventually drives a company into a "run away" situation. The 6 billion lire would not only reduce the interest charges but by improving the debt equity ratio and allowing an increased profitability it would also allow for new investment and support for new products and further increase in profits.

The most important point, however, is to introduce new products along the lines suggested in the report as soon as possible. We consider it of the utmost importance that this is discussed.

Dr. Medugno's comment on new products

6. As far as new products are concerned, it would be very difficult to put in new products to increase the sales level up to 12 billion lire necessary to protect the 130 people already on training plus the additional 250 people planned for.

Mr. Clare's answer to comment No. 6

It was indicated that IRI annual sales are presently 2,300 billion lire. The provisions of two billion lire value of new products to ELSI (to match a similar contribution from Raytheon sources) does not seem to be a very large problem to be solved as the key basis for a positive expansion of the already existing asset of Raytheon-ELSI.

General Comments by J. D. Clare

(a) After the first refusal by Finmeccanica, the reasons for us seeking an Italian partner and for approaching ESPI have been given in our various reports.

(b) We have created an electronic facility dealing with sophisticated products. This now exists as an asset with facilities, trained people, products and markets. As indicated in the reports this has been very costly indeed for Raytheon.

(c) We are proposing that expansion is based on stabilizing present products and then feeding in production only of new products supported by engineering and marketing elsewhere.

(d) Together with an Italian partner this asset can either be expanded along the lines suggested in the report or alternatively it can be run down.

(e) By our own efforts we have shown that the present product lines can be stabilized and new products can be fed in along the lines we suggest — we are looking for some organization in Italy that is interested in the planned expansion of this already existing asset in Sicily.

(f) We thought that it was within IRI's terms of reference to be interested in such situations particularly with regard to the possible development of electronics in the Mezzogiorno as part of the 5-year plans.

IRI and Finmeccanica point out that within the IRI Group, there are no concrete possibilities of ensuring a direct market outlet for Raytheon-ELSI's production. The only exceptions to this statement concern areas of marginal interest, or areas in which other IRI companies, which already have substantial problems of their own to be solved, are currently operating (as for example ATES, which also is in Sicily).

In summary, IRI believes that Raytheon-ELSI's situation cannot be made economically sound on the basis of the program outlined in the documentation submitted, and therefore does not see a possibility of intervention in the company. This belief is strengthened by IRI's conviction as mentioned above that its intervention would not bring about any significant change in the marketing position of the company, or as a consequence in the company's basic economic position, which would remain a serious problem area.

However, IRI desires to point out that even though — with great regret — it cannot accept Raytheon's request at this time, it remains possible that a later request by Raytheon might receive more favorable consideration. Such a decision could come when IRI, which intends to develop its activities in the electronics field, has completed an analysis in this area which is now being made in cooperation with other national groups interested in the electronics sector.

This analysis, which is expected to take one year, will permit a review of the general problem with much greater understanding. It should also lead to a determination of whether it will be possible for IRI to contemplate a special program of intervention to assist in putting Raytheon-ELSI on a sound basis, as requested by Raytheon.

Mr. Clare indicated his disappointment with the present decision made by IRI and took note of the further declarations of the Institute, stressing that unfortunately much time has passed since the first conversations on the ELSI problem, and that in the intervening period Raytheon has had to devote many efforts to the ELSI situation, without outside assistance.

II-14. JUSTIN GUIDI'S DESCRIPTION OF JANUARY EARTHQUAKES

[Not reproduced]

II-15. HILLYER'S MINUTES, DATED 21 FEBRUARY 1968, OF THE HON. CAROLLO'S MEETING ON 20 FEBRUARY 1968 WITH C. F. ADAMS

[See also **I**, *Memorial of the United States, Annex 15, Exhibit B, and* **III**, *Correspondence, Nos. 41, 52 and 54]*

21 February 1968.

MEETING WITH HON. VINCENZO CAROLLO, PRESIDENT OF THE SICILIAN REGION, IN HIS HOTEL ROOM IN ROME, 20TH FEB.

Present: Messrs. Adams, Clare, Hillyer, and Profumo.

CFA opened the meeting with the first paragraph of our prepared speech (Raytheon is convinced that ELSI can succeed with an appropriate partner, but we will not put up any more cash, etc.), and asked JDC to present our interpretation of Hon. C.'s position at our last meeting.

Hon. C. interrupted saying he is aware he made a commitment to us that IRI or ESPI would intervene within a month which has not been fulfilled because of the earthquakes. The position today is as it was in December, but tomorrow or at latest the day after tomorrow, he will meet with Messrs. Priti, Colombo, Andriotti, and Petrilli to discuss the overall package program to aid Sicily. As a part of this plan, Hon. C. hoped to obtain a Central Gov't commitment to develop the electronics industry in Sicily. This commitment would politically be equivalent to insuring IRI help for ELSI.

JDC emphasized that too much time has passed and that although FIAT has offered us a Director, IRI will only agree to provide an unofficial advisor. CFA added that IRI would not consider a Selenia and ELSI merger which we had proposed.

Hon. C. was quite aware of what IRI had told us, and knows that CIPE cannot act until the five-year plan is out. However, in his meetings of the next day or two he hopes to obtain a political commitment for electronics in Sicily, which will insure IRI action in the next 8/10 months and which will allow ESPI to act with fewer limitations. In short, the interests of Raytheon and the Region coincide, as

1. The Region wishes to protect any sources of jobs, and therefore wishes to protect ELSI, and
2. The Region wishes to use ELSI as its principal reason for centring the national electronics plan on Sicily and in fact on ELSI, and is using ELSI as a positive element in the current Ministerial level talks.
3. If Hon. C. can get a National Gov't commitment to come to Sicily through ELSI, this helps everyone. There will be a "yes" or "no" reply on this in the next day or two; Hon. C. will call us to meet again when he knows the answer and before he returns to Sicily.

CFA stressed that ELSI cannot survive without immediate cash help, which Raytheon cannot provide. JDC drew a precise time chart showing:

(*a*) 23 Feb. — Board Meeting.
(*b*) 26 to 29 Feb. — inevitable bank crisis
(*c*) 8 March — we run out of money and shut the plant.

Hon. C. repeated that our interests are the same, to keep ELSI alive and to improve it. He hopes to achieve this aim in the best way for all of us by obtaining a political commitment for support from IRI within the next two days. However, if this plan does not succeed, he gives us his "broadest assurances" that ESPI would then promptly intervene with Lire 4 billion.

CFA stated that while our interests coincide with those of the region, as a private company we do have obligations to our stockholders. While we can continue to provide ELSI with management and technology, we cannot provide money, without which ELSI will shortly disappear.

JDC posed five questions as follows:

1. Will Hon. C. visit the plant this week?

   Ans. No, because he will be here in Rome working on Moro *et al.* Anyway he did visit the plant six years ago.

2. Will he promise to talk to us again before returning to Palermo?

   Ans. Yes.

3. If the National Gov't will not intervene, what will be the extent of ESPI's intervention?

   Ans. A very difficult question based on our decision on whether we have the experience and the intelligence locally to manage such an enterprise. (Hon. C. obviously felt local intelligence would not be sufficient, later stating that ESPI would run the company into the ground in a year or two if left to its own devices.) JDC attempted valiantly to argue that with a FIAT director and possibly an IRI director acting for ESPI, ESPI could make a go of a majority position, particularly with continuing management help from Raytheon. Carollo would not buy this argument, unless the presence of FIAT and/or IRI was backed up by a financial commitment.

4. If the National Gov't will not intervene before you return to Palermo, can you give us an immediate private commitment that the Region will intervene?

   Ans. Yes.

5. How long will it take ESPI to go through the bureaucratic formalities leading to final investment?

   Ans. 30 to 60 days.

The meeting concluded with expressions of sympathy to Hon. C. for the disasters in the Region and of gratitude for his attention to our problem. (It was decided by private exchanges not to leave any documents with Hon. C. The preprepared "notes for the meeting" were left at his hotel later that evening with point (8) and the preceding paragraph on possible labor problems deleted. The following day, 21 Feb., a letter outlining Raytheon's conditions for continuing at ELSI together with a draft shareholders agreement with ESPI and summary thereof, were delivered to Hon. C's hotel.)

S. H. H.

II-16. C. F. ADAMS' LETTER TO THE HON. CAROLLO

[Italian text not reproduced]

(Translation)

Confidential – By Hand

21 February 1968.

Hon. Vincenzo Carollo
President of the "Giunta
Regionale Siciliana"
c/o Hotel Metropol
Rome

My dear Honorable President,

I would like to express our gratitude for the understanding and the constructive spirit you demonstrated in our talks of last night on the Raytheon-ELSI situation. I would also like to confirm to you the complete willingness of Raytheon Company to stand behind the positive points outlined in the notes for our meeting with you which we left at your Hotel following the meeting. In summary, given appropriate assistance, Raytheon remains willing, if you should so desire, to act as follows:

1. Continue to provide management assistance to ELSI in Palermo, and the support of our international organization for the sale of ELSI products.
2. Continue to provide and increase the technical support to ELSI from our US company.
3. Negotiate a merger of Selenia and ELSI, or a suitable business combination between the two, if this is permitted by Finmeccanica.
4. Transfer the production of marine radar from Selenia to ELSI, if this is permitted by Finmeccanica.
5. Provide technical advice to the Sicilian Region on the general development of its electronic industry.
6. Spread the payment of all amounts now owing by ELSI to Raytheon Company over a ten-year period.

Naturally, as a private industrial company with obvious responsibilities to our shareholders, we must define without ambiguity certain minimum indispensable conditions for the continuation of our participation in ELSI. We state as a premise that these conditions are rendered necessary by years of hard work and very large investments of capital which we have dedicated to our Palermo associated company, and all this at our own initiative.

These conditions will apply whether or not the Central Government gives you a political commitment to assist ELSI. To keep our Sicilian company in existence, we must count on your consent, in general, to the following:

1. Raytheon Company will not undertake to supply further financial contributions to ELSI.
2. As already indicated in our reports to ESPI, the use of any new investment in ELSI must include the cancellation of all bank guarantees currently provided by Raytheon Company in favor of ELSI.

3. We would prefer to become minority shareholders in ELSI. As a maximum compromise, we could maintain a 50 per cent participation in shareholdings. We cannot consider a solution which would leave us as a majority shareholder.
4. A 50/50 participation between Raytheon and ESPI would require the investment of 4 billion Lire on ESPI's part. In such an event, we would have to ask assurances that an additional intervention will be forthcoming in some form capable of permitting the cancellation of all other bank guarantees we are currently supplying in favor of Raytheon-ELSI.
5. To insure that the banks will not cause the closing of Raytheon-ELSI within the very near future, the management of the company should be authorized within the next few days to communicate to the banks on a strictly confidential basis that the Region has undertaken to assume a participation in ELSI of at least 4 billion, which will be paid in no later than 30 April 1968.

I submit these conditions now not to take a harsh or insensitive attitude for the problem of ELSI and the Region, but only because I wish to clarify such conditions without possibility of misunderstanding the general position of our company as a private enterprise.

Furthermore, I attach to the present letter a draft of a proposal (and a relative summary), which indicates the form of the agreement with ESPI which we would prefer.

We also feel under a duty to bring to your knowledge the fact that, because of the intense competition which has recently arisen in the field of cathode ray tubes for television sets, from a strictly commercial point of view it would be necessary to review and correct certain aspects of the agreements between ELSI and the Unions, even though this might turn out to be unwelcome by the Unions themselves. The management of ELSI proposes to initiate the necessary negotiations without delay, in order to carry them to conclusion before the Region intervention is made a matter of public knowledge. It is also dutiful on our part to inform you that the introduction of new proposals in ELSI may not take place within a period of time sufficiently short to absorb the personnel now assigned to subsidized training courses. At least from an industrial point of view, it would be advisable to solve also this problem before the public is made aware of the Region's intervention.

I personally, and all of my colleagues, sincerely appreciate all the efforts you have dedicated to the problem of Raytheon-ELSI. We all hope that it will be possible to solve this problem in the best common interest.

Raytheon Company

(Signed) Charles F. ADAMS,
Chairman of the Board.

II-17. John Clare Letter to the Hon. Carollo Dated 28 February 1968

[Italian text not reproduced]

28 February 1968.

Hon. Vincenzo Carollo
President of the Junta
for the Sicilian Region
Orleans Palace
Independenza Square
Palermo

Dear Hon. Carollo,

I will not conceal that I was disappointed and disturbed to realize yesterday that you would not be at the meeting in Rome, after I had been informed that you would be present. Hon. La Loggia outlined again for us your viewpoint which really reconfirmed what you told us in our meeting last week. A copy of the notes we produced of our meeting with Hon. La Loggia is enclosed.

I will be visiting Palermo tomorrow and I hope that I shall have the opportunity to meet with you as you promised at our last meeting in Rome. I shall then have the opportunity to hand deliver these notes. If I cannot meet with you, I will arrange to send this letter and the notes to you and will then regretfully have to begin to presume that your decision is negative.

I would like to reconfirm our position:

1. We do not want just money. We need:

   (*a*) New capital;
   (*b*) A partner to help us obtain the benefits to which Mezzogiorno companies are entitled;
   (*c*) A partner to help us find new products.

This is as we have consistently stated throughout all of our reports.

2. We will not take a majority position.

3. Our offer of the 50/50 arrangement is our ultimate compromise. We need you to be committed as much as we are. This will still call for an investment of six billion lire of which two billion will now have to be in some interest-free form other than ordinary capital stock.

4. We need to renegotiate our agreements with the Unions. We regard this as an essential prerequisite for any viable future.

5. We regard it as essential to trim down the present personnel to become as competitive as possible before further expansion.

6. Time is now very short. I have already told you about the problems which are pressing us, in relation to our time schedule according to which events may precipitate irreparable consequences.

This is just a reconfirmation of the points we have already made clear to you. I did indicate to Hon. La Loggia a possible alternative solution which you might like to consider. He promised that he would report this to you over the telephone and I am looking forward to discussing this other possibility with you when we meet tomorrow.

(*Signed*) John D. Clare,
Vice President, General
Manager, Europe.

cc: Hon. La Loggia
(ESPI)

II-18. ANNOUNCEMENT OF DECISION TO CEASE TRADING

[Italian text and English translation not reproduced; for another translation, see infra, *Rejoinder of Italy, Document 21]*

II-19. MINUTES OF ELSI BOARD MEETING WHERE DECISION TAKEN TO CEASE TRADING

[Italian text not reproduced; for the English translation, see **I**, *Memorial of the United States, Annex 15, Exhibit D]*

II-20. MINUTES OF MEETING WITH THE HON. CARBONE

[See **I**, *Memorial of the United States, Annex 15, Exhibit G]*

II-21. FORM OF DISMISSAL LETTERS TO EMPLOYEES[1]

[Italian text not reproduced]

FORM OF DISMISSAL LETTER

(Translation)

Dear Sir,

For many years, Raytheon-ELSI has had, and continues to have, great losses. Conscious of the importance of the company to the public of Sicily and of Palermo, our shareholders have contributed many billions of lire to promote the success of the company.

During the last twelve months, your Management has made great efforts to obtain new capital and products from many sources, both governmental and industrial. These efforts, unfortunately, have not had positive results. Raytheon-ELSI, therefore, is forced to cease its activities because it is rapidly approaching a total lack of resources with which to operate.

Consequently, your Management is compelled to dismiss all of its employees. Only a few persons will be retained temporarily who are needed to handle all necessary action relative to the administrative, commercial and technical aspects of closing the company's activities. These few persons will also be needed to organize and carry out without delay the payment of all that is due to the dismissed personnel.

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[1] The dismissal letters were mailed on 29 March 1968.

With deep regret, we hereby communicate to you your dismissal with immediate effect for the foregoing reasons. To facilitate your search for new work, the company agrees that you need not work before or during the period of the notice which in normal circumstances would have been sent to you. As a consequence, as of today, you are no longer to report for work since the company has no more work to offer.

You will be paid an indemnity in substitution of notice equal to the amount of your remuneration for the period of the notice you are not given. Such period will be counted for the purpose of calculating your severance benefits, and, if such be the case, for the purpose of any other payments owing to you, all in accordance with the laws and agreements in force. It will be your Management's task to notify you as soon as possible of the arrangements being made for the full payment of all monies due to you, as well as for the handling of all connected administrative actions.

Your Management wishes to express to you their appreciation for the work done by you for the company and sincerely hopes that you will be able to obtain soon new and adequate employment.

RAYTHEON-ELSI S.p.A.
The Managing Director.

II-22. FORM OF LETTERS TO RETAINED EMPLOYEES

[Italian text and English translation not reproduced]

II-23. MR. OPPENHEIM'S ANALYSIS OF ASSETS AND INVENTORY

[See I*, Memorial of the United States, Annex 17, Exhibit A]*

II-24 TO II-28. EXPRESSIONS OF BUYER INTEREST IN ELSI PROPERTY

31 March 1969.

Raytheon Company
141 Spring St.
Lexington, Mass. 02173

Attention: Mr. Thomas L. Phillips,
President

Dear Sir,

I have read a report in the *Wall Street Journal* that your Sicilian Italian venture is having difficulties.

I am a partner in a machine tool company, and equipment manufacturing distributor. Additionally, I am a principal in a wide group of manufacturing companies that have interests here and abroad.

I would be happy to consider what you have as a surplus situation, or as a manufacturing situation.

My activities are well known to:

First National City Bank
399 Park Ave.
New York, N.Y. 10022
Mr. Eric Schmitt, V.P.
Mr. Thomas Creamer, Sr. V.P.
Tel. 559-3154.

(Signed) Louis D. SRYBNIK.

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25 April 1969.

Dear Mr. Srybnik,

Thank you for your recent letter to Mr. T. L. Phillips, President of Raytheon Company, indicating an interest in Raytheon-ELSI S.p.A.

We are confident that you appreciate that operations of the Palermo subsidiary were terminated early in 1968. However, your suggestion is currently being considered and, if further discussions appear appropriate, you will be advised at an early date.

(Signed) John B. BOND.

Mr. Louis D. Srybnik
S&S Machinery Company
140-53rd Street
Brooklyn, New York 11232.

bcc: J. Oppenheim
C. H. Resnick.

J. J. Guidi. Rayelro, Rome. MJRC extremely interested in purchasing microwave tube equipment and possibly some semiconductor equipment from ELSI. We will send our engineers to examine equipment available as soon as you can give us reasonable assurance that you can sell to us. Please forward description of equipment. Fukagawa. MJRC.

Piraeus, 8 April 1969.

Raytheon Co.
Int'l Sales & Services
Lexington Mass.
US 02173.

Gentlemen,

As we are preparing a TV Factory also TV picture tubes factory in Greece, and as we heard from our last trip in Europe, you are selling your factory in Italy for TV picture tubes in black and white. If this is true please let us know all the conditions and terms of all the machinery sale.

(Signed) D. HALAZONITIS.

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19 May 1969.

Mr. D. Halazonitis
Radiotelephoniki
2 Paleas Trapezis Street,
Piraeus, Greece.

Dear Mr. Halazonitis,

Thank you for your letter of April 8 inquiring as to a TV Factory in Italy. We presume that your letter refers to our former subsidiary, ELSI, located in Palermo, Sicily.

The assets of ELSI are under control of a curator whose name and address are as follows: Avv. Giuseppe Siracusa, Curatore del Fallimento della ELSI S.p.A., Piazza de Ungheria 84, 90141 Palermo, Sicily, Italy.

There may well be individual negotiations with respect to the purchase of equipment for product lines including television tubes in the future. There may also be public auctions held at which you may wish to participate. I would suggest that you write to the curator directly expressing your interest and inquiring as to conditions and terms.

(Signed) Joseph OPPENHEIM,
Vice President
International Affairs.

Cc. Avv. G. Bisconti.
Avv. G. Siracusa.

P.S. If you will furnish us with copies of your inquiry to the curator, we will attempt to be helpful in connection with your interest wherever we can.

Piraeus, 12 June 1969.

Raytheon Company
Lexington/Mass 02173.

Dear Mr. Oppenheim,

Thank you very much for your kind letter of 19th May, contents of which has been duly noted.

As you can see as per enclosed copy of our letter addressed to Mr. G. Siracusa, we are asking of what we shall need.

(Signed) D. HALAZONITIS.

Piraeus, 12 June 1969.

Avv. G. Siracusa
Piazza de Ungheria 84
90141 Palermo
Sicily

Dear Sir,

We got your address from Raytheon Company and we would like to inform you that we are preparing a TV Factory also TV picture tubes Factory in Greece. We have heard that ELSI Factory machinery and equipment will be sold out. As we are interested please let us know all the conditions on this.

D. HALAZONITIS.

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18 February 1969.

Mr. Egidio Rinaldi
Via Biscolati, 76
Roma, Italy

Dear Mr. Rinaldi,

Up to this date, I have not received the list of equipment, with prices, which Mr. Siracusa promised to send promptly.

Could I trouble you again to inquire from Mr. Siracusa what has happened?

SEMICONDUCTORES CALIFORNIA, S.A.
(Signed) F. J. KING

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7 August 1968.

Mr. Joe Oppenheim
Lexington Corporate Headquarters
Lexington, Massachusetts.

Dear Joe,

Fritz Gross called me yesterday and asked me to meet with Mr. Myhre, General Manager of Terma Elektronisk Industri A/S, whose card is enclosed.

Briefly, Mr. Myhre was interested in the possibility of his company producing the S and X Band items formerly produced by ELSI. He evidenced interest in purchasing ELSI's equipment and in obtaining related technical assistance from Raytheon.

Several of the officials of his company will be in Rome in the near future for discussions with Selenia Officials. He would like for them to see you at that time about the possible purchase of this ELSI line.

(Signed) Howard E. HENSLEIGH.

Unnumbered Documents, Volume II

III-1. DIARY ENTRIES REGARDING DISCUSSIONS WITH THE HON. CARBONE ON 29 MARCH AND 30 MARCH[1]

[See **I**, *Memorial of the United States, Annex 15, Exhibit H]*

III-2. MAYOR'S DECREE OF REQUISITION

[Italian text not reproduced; for the English translation see **I**, *p. 39]*

III-3. COPY OF 1955 STATUTE

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 35]*

III-4. COPY OF 1865 STATUTE

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 34]*

III-5. ELSI'S TELEGRAM AND APPEAL TO THE MAYOR OF PALERMO

[Italian texts not reproduced]

9 April 1968.

TELEGRAM TO THE MAYOR OF PALERMO

Raytheon-ELSI is firmly opposed to the requisitioning (foreclosure) of the company property ordered by you and to the initiation of related inventory proceedings. We consider the requisitioning as a mere attempt to delay the proceedings. We consider the requisitioning as a mere attempt to delay the solution of the problem and to create false hopes among the ELSI workers, in the company and in the Region. Please note that the position of Raytheon-ELSI is as follows. First, the requisitioning is illegal. Second, entering the property for initiating an inventory is illegal. If you enter the facility without formal approval by the cognizant military authorities you incur the risk of violating the laws and regulations governing national security and military secrets and you will be responsible for any such violations. Third, you will be responsible for any cost and expenses up to the date the property is restored to the company. Fourth, you will be responsible for any damages to the property. Fifth, you will be responsible for any damages to Raytheon-ELSI and its shareholders that may result from the loss of control over the property by the Raytheon-ELSI management including damages or losses through nonfulfillment of contractual obligations. Sixth, apart from the fundamental illegality of the requisitioning please note that you are not authorized to use, touch, inspect or inventory the books, archives, warehouse, supplies, equipment, money or other property of Raytheon-ELSI not specifically listed in the requisitioning order. Seventh, you have no right to use the trademark or registered name belonging to Raytheon-ELSI or used by it under license from third parties. Eighth, you have no right to use patents or technical information belonging to Raytheon-ELSI or used by it under license from third parties. Ninth, you have no right to use any personnel currently employed by Raytheon-ELSI. Tenth, you have no right to interfere in the contractual relations of Raytheon-ELSI. Eleventh, your invitation to Raytheon-ELSI to send observers does not include the necessary guarantees for the personal safety of these observers. Twelfth, the management of Raytheon-ELSI will vigorously pursue all available legal avenues and shall take any other steps conducive to the revocation of the requisitioning with resulting damages, against the mayor and the Central Government and individuals who commit illegal acts in any form.

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[1] The said discussions took place on 30 and 31 March 1968.

Copies of this telegram being sent to the Hon. President of the Council, Moro. The Ministers Fanfani, Pieraccini, Andreotti. The President of the Sicilian Region Carollo. The Embassy of the United States in Rome and the American Consulate General in Palermo as well as the Prefect of Palermo, Colonel Alemanno, SID-USPA, Col. Inzerillo, Palermo, Dr. Fenu, Co-ordination Service and Ing. Laurin, Raytheon-ELSI.

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14 July 1969.

(Translation)

Raytheon-ELSI S.p.A., with registered office in Palermo, Via Villagrazia 79, by its legal representative

Whereas

— the Mayor of the City of Palermo, by order served on 2 April 1968, ordered the requisition of the plant and equipment of the company, located in Palermo, Via Villagrazia 79;

- the company considers said order of the Mayor absolutely illegal and lacking any lawful grounds, and also arbitrary and unfit to solve the social and economic problems referred to in said order;
- said illegal and arbitrary order of the Mayor is causing serious damages and may cause irreparable damages to the company;
- the company intends to resist said illegal and arbitrary order of the Mayor using all legal means, and demands repayment of all damages suffered and to be suffered:

Invites

the Mayor of Palermo to revoke immediately said order in order to prevent the situation from becoming worse and further irreparable damages being suffered;

Declares

- that it rejects any and all responsibility however arising out of, or connected with, said illegal and arbitrary order;
- that in any event, beginning with the moment said illegal and arbitrary order has been served, — without prejudice to any other right of the company — the responsibility for anything that may happen relative to the plant and equipment and to every other matter forming the object of said order or of subsequent orders rests exclusively with the authority which has issued such order or orders and the company shall take or accept no responsibility whatsoever, and in particular, without limiting the generality of the above, said Authority and its agents shall have each and every responsibility arising out of the violation of, or negligent, mistaken or omitted observance of security rules for the plant, the equipment and every other asset of the company; the violation of, or negligent, mistaken or omitted observance of rules relating to the protection of military secrets; the negligent, mistaken or omitted use of any equipment or object located on the premises of the company harmful events such as fire or other natural events;
- that in any event, starting with the moment said illegal and arbitrary order has been served — without prejudice to every other right of the company — every cost, expense and burden relative to the plant, the equipment and the use of same, their maintenance, etc., shall be exclusively borne by the authority which has issued the order;
- that in any event starting with the moment said illegal and arbitrary order has been served — without prejudice to every other right of the company — each and every liability however arising out of the impossibility for the company to fulfill — or to fulfill in time — its obligations because of its inability to dispose of the plant and of what is situated therein or in any way because or by reason of said illegal and arbitrary order shall rest with the authority which has issued such order and not with the company.

Warns

the Mayor of the City of Palermo not to further violate or interfere with the rights of the company and in particular, without limiting the generality of the foregoing, not to interfere in any manner with the activities of the company's governing bodies or officers in the performance of the mandates lawfully vested in them; not to use in any manner the name, trademark, patents, industrial and commercial secrets owned by the company or used by it under lawful agreements with third parties; not to interfere in any manner with the relationships between the company and its customers or its suppliers or between the company and its employees; and further recalling the considerable contribution of capital, technology and education that Raytheon-ELSI has brought to the Sicilian economy and to Palermo in particular, in answer to an invitation by the Italian and the Regional Government to private industry with a view to facilitate and accelerate the industrial and economic development of the island, warns the Mayor of the City of Palermo not to implement with further illegal and arbitrary acts an order which is essentially confiscatory in substance, if not in form, an order which appears as a hostile act against private industry and against American industry in particular which has looked and still looks upon Sicily with particular friendliness and benevolence.

RAYTHEON-ELSI S.p.A.
for The Board of Directors,
(Signed) Justin J. GUIDI,
Managing Director.

11 April 1968.

Signed to certify the authenticity of the signatures affixed at the bottom of the foregoing act and in the margins of the first sheet, countersigned by me, by Mr. Justin Joseph Guidi, born in New Alexandria, Pennsylvania (USA) on 16 November 1924, resident in Rome, Via Salsomaggiore 4, and for the purposes of his office in Palermo, Via Villagrazia 79, a person of whose identity I am certain.

Rome, 11 April 1968.

(Signed) Dr. Carlo RAITI,
Notary in Rome.

At the request of Mr. Justin Joseph Guidi, legal representative of Raytheon-ELSI S.p.A., resident in Rome, Via Salsomaggiore 4, and for the purposes of his office in Palermo, Via Villagrazia 79, the undersigned adjutant judicial officer has notified this act to the Mayor of Palermo, in Piazza Pretoria, Palace of the Eagles, in the hands of Mr. Vincenzo Ferrari, an employee of the Legal Affairs Department.

12 April 1968.

(Signed) Giovanni FRINCHI,
Adj. Judic. Officer — Palermo.

III-6. NEWSPAPER CLIPPINGS DESCRIBING WORKER DEMONSTRATIONS

[Italian text and English translation not reproduced]

III-7. ELSI'S APPEAL TO THE PREFECT

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 36]*

III-8. THE PREFECT'S DECISION

[Italian text and English translation not reproduced; for another translation see **I**, *Memorial of the United States, Annex 76]*

III-9. THE CURATOR'S COMPLAINT AGAINST THE ITALIAN GOVERNMENT AND THE MAYOR OF PALERMO FOR DAMAGES

[Italian text and English translation not reproduced; for another English translation see **I**, *Memorial of the United States, Annex 79]*

III-10. MINUTES OF 16 APRIL 1968 MEETING WITH THE HON. CAROLLO

MEETING WITH HON. CAROLLO

Present: J. D. Clare, J. Oppenheim, J. Scopelliti

Palermo, 16 April 1968

Hon. Carollo asked what had happened at the meeting held with Minister Pierascini. Mr. Clare replied that in effect nothing had happened. Pierascini is still talking to IRI, but cannot tell IRI what to do. We explained carefully what our proposal of selling the assets really means. The Minister was interested in this, asked for details about the price put on the assets, and mentioned the possibility of IRI coming in with new products.

Hon. Carollo stated that tomorrow Prime Minister Moro will hold a definitive meeting with the Ministers and experts concerned. One of the problems to be faced is that the Region does not know exactly what Raytheon wants.

Mr. Clare replied that we have told the Region many times and in great detail what we want. Of course any proposal is subject to negotiation, but basically we have consistently asked for financial participation by the Region and by IRI, and for new products from IRI. If ELSI is left as it is, it will continue to lose money, which IRI has quite correctly noted. Yet IRI is in a position to help Raytheon bring new products into ELSI. IRI's present product lines are not sufficient to maintain the company, and therefore IRI will not participate. However, with IRI's product support, ELSI could be made profitable.

Hon. Carollo stated that Raytheon has always emphasized the value of ELSI's trained labor force. However, the Central Government has been waiting for a demonstration of our financial and production strength, which we have not given. Had we been able to show some concrete results, we would have been able to deal from a strong position; instead, with the factory closed, the situation has been precipitated

Carollo's feeling is that Raytheon just wants to get out of ELSI, with the thought that there may be a tax break on some of the losses. However, Raytheon of course wishes to realize the best price possible for the assets and know-how of ELSI, perhaps 10 to 12 billion lire. Carollo's belief, based on studies made by his experts, is that the assets are worth much, much less than this. A solution might be to arbitrate the sale price from Raytheon to the Region, with an arbitration board of three men representing the Region, Raytheon, and the local magistrate. However, since the plant is closed, the value of the land, buildings, and material has been reduced by 90 per cent. Raytheon made an error, in Carollo's opinion, by closing the plant before proposing liquidation and thus automatically devaluing the assets.

Carollo is quite prepared to hire all ELSI's personnel, even at 2.5 billion lire a year, and put them to work in the mines until we go bankrupt and sell off our assets. If he can face this possibility, we must too.

IRI will come to Sicily with a plant for telephone equipment. Carollo had hoped we would show strength by being present with an open factory, in which case IRI might have dealt with us. With a closed factory, we have no position.

Speaking frankly, Carollo told us that he has agreement from CIPE that an electronics plant employing 2,000 people will be established in Palermo, which is satisfactory from a political point of view. From the Region's point of view, it is well worth while to keep ELSI's personnel together on the Region's payroll for two years at a cost of four billion lire, as this amount will be returned many times over by the taxes the new plant will pay. This plan will be reviewed at tomorrow's meeting with Moro. Carollo would prefer to see ELSI's people working with ELSI remaining open, as in this manner there would be a chance of maintaining both ELSI's product lines and the products of the new plant.

However, if ELSI remains closed, the banks will not help Raytheon. Carollo feels that, unfortunately, Raytheon has not followed his advice; we had the strength to influence the Central Government before closing ELSI. As things stand, there is no point in dealing with IRI while ELSI is closed.

Mr. Clare pointed out that we have made continuous efforts to interest the Central Government in our problem, and have not been listened to. We have proposed many ways of solving the ELSI problem, including the specific telephone equipment as a new product for ELSI which IRI now plans to make as a separate venture, and no one was ever willing to negotiate with us. In the meantime we kept putting in money and management effort, until we just reached the end of the line. Should Raytheon liquidate ELSI, we will have left 14 billion lire in Sicily, money that has served to train people in difficult skills, and that has considerably helped Italy's balance of payments as half of ELSI's production was exported.

Carollo asked if we have approached IRI on a package basis, giving up a part of our share of Selenia in return for IRI help on ELSI. If we negotiate just about ELSI, it will be hard to interest IRI, but a Selenia/ELSI package might interest them.

Mr. Clare said that such a possibility had been amply explored and turned down by IRI. He expressed surprise that the Government is willing to undertake the cost of building and starting-up a new plant. The ELSI plant exists, and has value for the region. Yet from June to December 1968, when Hon. Carollo was finally elected President of the Region, Raytheon could find no one who would even listen seriously to our proposals. We worked as hard as we could both to improve ELSI's operations and to obtain Government help, but when no help was forthcoming we had to shut down. Now all we can offer is the sale of our assets. If the Region is not interested in them, we will sell them off as best we can inside or outside Italy, and the Region will be the loser.

Carollo indicated that he understands Raytheon's desire to leave, but the Region does not have the technical or managerial skill to operate such a plant. IRI would be a possible substitute for Raytheon. As a thought, we might wish to inform our banks and creditors that we wish to liquidate, and seek an agreed liquidation placing all the assets in the hands of the banks. As the major bank creditors are IRI banks, they might put pressure on IRI to come in. If Carollo could state to Moro tomorrow with a written confirmation that ELSI will be liquidated, that Raytheon will not cover ELSI's debts, and that ELSI's debts will be paid only to the amount covered by the liquidation value of the assets, this would be useful to him.

Mr. Clare replied that until recently, we have been planning a positive future for ELSI. We are not prepared to state our position on liquidation vis-à-vis the banks; this will be determined by what develops in the near future.

Carollo replied that he can probably help us. Raytheon is willing to let ELSI go bankrupt. There are two roads possible, as follows:

1. Re-open the plant, which gives us strength with our creditors because they will know that if we should close again, the asset recovery potential would be greatly reduced.
2. Keep the plant closed, which is a position of great weakness that can only lead to bankruptcy.

Mr. Clare replied that we are not in a position to follow the first road, while very damaging for Raytheon, should prove a strong point for Carollo in the long run.

Hon. Carollo said that the problem is that IRI is upset that Raytheon has all the strength in the Selenia agreement. In fact, IRI hates Raytheon. There will be a battle between Raytheon and IRI, and we should deal from the strength of having ELSI open. IRI is such an adversary of Raytheon that they have advised Carollo to wait for their new plant and not to negotiate on ELSI, as Raytheon can be forced to kneel down. Raytheon would be well-advised to re-open the ELSI plant, and with the Region's help force IRI to negotiate. Otherwise, we are prepared for liquidation, but it will not be advantageous for Raytheon.

Hon. Carollo concluded the meeting by saying that he will know more after the meeting with Moro in Rome the following day; we can call him to learn the results.

III-11. Hillyer's Notes of Late April Meeting with the Hon. Carollo

[See I, *Memorial of the United States, Annex 37]*

III-12. THE HON. CAROLLO'S LETTER REGARDING ELSI

[Not reproduced: for an English translation see I, *Memorial of the United States, Annex 38. See also* I.C.J. Reports 1989, *pp. 34-35]*

III-13. RAYTHEON'S LETTER TO ELSI ADVISING IT WILL PUT IN NO FURTHER CAPITAL

7 March 1968.

The Board of Directors of
Raytheon-ELSI S.p.A.
Via Villagrazia 79
Palermo

Attn.: Mr. John D. Clare,
Chairman.

Gentlemen,

On review of the proposed balance sheet of Raytheon-ELSI S.p.A., as of 30th September 1967, and reports of operating statements since that date, it becomes apparent to us that Raytheon-ELSI requires additional equity capital in order to continue its operations.

The Management of Raytheon Company has carefully reviewed the history of its participation as a stockholder in Raytheon-ELSI. To date Raytheon's equity investments (exclusive of accounts receivable owed to it and guarantees currently outstanding) is about 7.5 billion Lire.

When added to the guarantees outstanding, Raytheon's investment and obligations with respect to Raytheon-ELSI amount to more than 12 billion Lire.

As you know, the Management of Raytheon Company and of Raytheon-ELSI have made a determined effort to obtain equity participation during the past year by IRI, ESPI, FIAT and other Italian concerns. To date, none of them has been willing to advance the needed capital.

We have studied our overall obligations to the Stockholders of Raytheon Company and have also taken into account the newly imposed restrictions upon foreign investments by the Government of the United States.

Under the circumstances, Raytheon Company cannot obligate itself further and must decline to subscribe to any further stock which might be issued by Raytheon-ELSI or to guarantee any additional loans which might be made by others to Raytheon-ELSI.

We regret the necessity for this decision which is the only one open to us in the circumstances.

Raytheon Company,
(Signed) Charles F. ADAMS,
Chairman of the Board.

III-14. OPPENHEIM'S LETTER TO THE HON. CAROLLO

[See **I**, *Memorial of the United States, Annex 39]*

III-15. PROVISIONS OF ITALIAN CODE REQUIRING BANKRUPTCY

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 41]*

III-16. COPY OF PETITION IN BANKRUPTCY

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 43]*

III-17. AJUDICATION OF BANKRUPTCY

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 44]*

III-18. HISTORY OF CREDITORS' COMMITTEE

[Not reproduced]

III-19. COPIES OF THE ADVERTISEMENTS OF THE AUCTION

[Not reproduced]

III-20. AFFIDAVITS OF AVV. BISCONTI, MR. OPPENHEIM AND AVV. RESNICK

[Italian translation not reproduced; for the English translation see **I**, *Memorial of the United States, Annexes 29, 27 and 28, respectively]*

III-21. PROVISIONS OF THE CRIMINAL CODE WITH RESPECT TO UNLAWFUL OCCUPATION OF PROPERTY

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 95]*

III-21A. AUTHORIZATION FOR PAYMENT BY MAYOR OF PALERMO OF ELSI'S FORMER WORKERS

[With Sicilian Regional Law No. 16 of 7 June 1969 and newspaper clipping in Annexes]

[Italian text and newspaper clipping not reproduced]

Palermo, 27 June 1969.

Region of Sicily
Office of the President
Regional Treasury Department, I.R.S.S. Div. I
File No. 106695

Subject: Regional Law No. 16 of June 1969 — Provisions on Behalf of the Employees of the former ELSI of Palermo

To: Bank of Sicily, Palermo
Central Institute for Savings, Palermo
The Hon. Judge in the Bankruptcy Case of
Raytheon-ELSI at
the Civil Court of Palermo

Article 5 of Regional law of June 1969, reprinted in the Official News of the Sicilian Region No. 28 of same date, provided for a Region-financed guarantee on behalf of the above banking institutions for the severance pay due the workers previously employed by Raytheon-ELSI of Palermo, based on the amounts allowed for as part of the bankruptcy liabilities determined by the Court.

In connection with the above the interested banking institutions are requested to furnish, at the earliest date possible, a statement of participation also indicating the extent to which each of them will provide financing.

For the issuance of a formal guarantee the undersigned will obtain the following documentation:

- abstract of the bankruptcy statement released by the Clerk of the Court relative to the individual credits granted the said workers indicating, for each of them, the job title held within the bankrupt company;
- authorization by the Court to proceed with the steps provided for in Articles 4 and 5 of the above-mentioned Regional law, subject to the condition outlined in the last paragraph of Article 4.

We look forward to receiving your immediate response.

The Deputy Assessor

(Attorney Giuseppe CELI).

LAWS AND REGULATIONS

Legislative Act No. 16 of 7 June 1969.
Provisions on behalf of the employees of the former ELSI, Palermo.

Region of Sicily

The Regional Assembly has approved, and the Regional President has enacted, the following law:

Article 1

For the purpose of the provisions of legislative act No. 12 of 13 May 1968, the additional release of L.405 million is authorized to cover the period 1 January-30 April 1969.

Article 2

The compensation provided for in Article 1 of the aforesaid legislative act may not exceed L.300,000 per month and is payable to those employees of the bankrupt Raytheon-ELSI Company who worked at the Palermo facility and will be taken over by Elettronica Telecomunicazioni in accordance with the terms of the agreement submitted to the Secretary of Labour on 29 January 1969.

Article 3

The compensation allowed by legislative act No. 12 of 13 May 1968 and subsequent additions and amendments also applies to the employees of the bankrupt Raytheon-ELSI for the periods during which they were supported by I.N.A.M. and received medical and medicinal care without collecting economic compensation.

The cost resulting from the application of this article will be covered out of appropriations authorized for the implementation of the legislative acts referred to above.

Article 4

The credit institutions entrusted with the disbursement services of the Region are authorized to lend to the workers previously employed by Raytheon-ELSI of Palermo the amount of severance pay due them but for the bankruptcy situation administered by the Court.

The credit institutions will be covered for the credits granted by appropriate liabilities on the part of the employees concerned.

Article 5

The loans made under the provisions of the preceding article are guaranteed by way of subsidies by the Region. Such guarantee is limited to the principal only and is available for the maximum amount of L.1,100,000,000 for a period not exceeding one year from completion of the liquidation of Raytheon-ELSI.

Article 6

The advance or loan according to the preceding articles will be granted at an interest rate of 7 per cent per annum which includes peripheral expenses and fees. Resulting costs will be charged against the Region.

Article 7

The workers previously employed by Raytheon-ELSI of Palermo and eligible for full compensation under the provisions of Article 2 of legislative act No. 1115 of 5 November 1968, will be paid, at the expense of the Region, a compensation amount corresponding to 20 per cent of the total retribution, calculated in accordance with the above-cited criteria.

The former employees of Raytheon-ELSI, top management excluded, who will be rehired by the new company at a later date, shall receive a compensation corresponding to the basic retribution but not exceeding the limits determined in Article 2 of the Regional Law No. 4 of 8 March 1969, nor the time-limits indicated in Article 2 of legislative act No. 1115 of 5 November 1968.

For the purpose of the provisions of this Article 7, a total expenditure of up to L.295,000,000 is authorized.

Article 8

Payment of the compensation under the provisions of this law will be the responsibility of the Regional Assessor's Office. The money required will therefore be made available to the Sicilian Fund for the Assistance and Placement of Unemployed Workers, established per Regional D.L.P. (law) No. 25 of 18 April 1951.

Article 9

The burden arising from Articles 1 and 7 of this legislation will be absorbed by using the money assigned for other measures in favour of ELSI Palermo as allowed for in the arrangement per item 10833 of the Regional expense-budget forecast for the year 1969.

Article 10

The burden possibly resulting from the subsidy guarantee per Article 5 above will be covered by the assignment of L.1,100,000,000 from item 20731 of the Regional budget for the year 1970, financed by utilizing part of the funds available through the 1969 cessation of the expenditure authorized by the first paragraph of Article 12 of Regional law No. 10 of 4 June 1964, coming up again in the 1969 fiscal year under the provisions of Article 3 of Regional law No. 12 of 3 May 1966.

The burden resulting from Article 6, estimated at L.77,000,000 per annum for three years beginning this year, will be covered in the fiscal year 1969 by utilizing part of the funds available under item 20911 of the budget report, providing for Regional budget expenses in the said fiscal year, leaving requirements in the amount of L.154,000,000 for the two following fiscal years for which L.4,000,000 will be raised by utilizing part of the funds available through the 1969 cessation of expenditures authorized by the first paragraph of Article 12 of Regional law No. 10 of 4 June 1964, coming up again in the 1969 fiscal year under the provisions of Article 3 of Regional law No. 12 of 3 May 1966, while the remaining L.150,000,000 will be raised with funds available from the cessation of expenditures at the conclusion of decennial obligations, as authorized per Article 4, first paragraph, of Regional law No. 51 of 5 August 1957.

Article 11

With the above Article 10 depending on list No. 4 attached to the budget forecast for the current financial year, the following variations apply:

Capital expenditures	*Amount in L. million*
Item 20911 — Money required for covering outlays, obligations, etc.	
Object of provision	
— Decreasing portion: Provisions for industrial development incentives . . .	below 77
— Increasing portion: Other provisions on behalf of the employees of the former ELSI/Palermo	over 77

Article 12

The President of the Region is authorized to arrange, by appropriate decrees, for the necessary budget adjustments.

Article 13

This legislative act will be publicized in the Official News of the Sicilian Region and will become effective on the day of publication. All concerned are obligated to observe it, and enforce its observance, as a Law of the Region.

Palermo, 7 June 1969.

FASINO

MACALUSO.

III-22. Press Releases by Central Government in November of 1968 Reporting ELSI Takeover

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 47]*

III-22A. Newspaper Clipping Regarding IRI Promises Made in November

[Italian text not reproduced; for another English translation see **I**, *Memorial of the United States, Annex 59]*

Palermo — Sunday, 6 April 1969, *Giornale Di Sicilia*

ELSI "There Was an Agreement" says Carollo by Ettore Serio.

It should have been merely a demonstration of solidarity with the employees of ELSI, for 428 days engaged in a desperate battle to save their factory from closing. The intervention of several regional deputies, and especially of the ex-President of the Region, Carollo, has transformed it instead into a real and true political debate, which will have, almost certainly, repercussions at the Sale d'Ercole.

Last night the Politeama Theater was filled almost to the boxes. For the "Easter of the ELSI workers" all the feminine movements and the other factories of Palermo had given their assent. The interior of the Theater had been festooned with a long series of slogans. "We are wrong — said one — to hope in who does not know how — nor wish — to resolve our problem." And another: "We want to be free from need. Give us work to make us feel free."

Phrases of this type give an idea of the tone of the interventions of various orators (basic syndicalists, exponents of the feminine movement, political men) who followed one another to the microphone. But the most important intervention came from the Honorable Vincent Carollo, who had been seated in an armchair in the last row and who had been loudly called to express his thoughts. Rather, more precisely — as Colombo, one of the secretaries of the Chamber of Labour clearly told him to "confirm" several of his declarations from the time when he was President of the Region which have been afterwards denied by the parties concerned with the solution of the ELSI problem. Colombo was referring to a notice of last October when Corollo and competent ministers of the National Government had given as attained the agreement on the relief of the Guadagna factory on the part of IRI.

Last night Carollo confirmed the news, inserting a clamorous element in the polemics of these days. He said: "There is an agreement: precise, written, and signed." It foresaw the relief of ELSI by IRI in the same financial terms that were considered when the formation of a mixed society — IRI-IMI-Region was delineated.

The agreement, as Carollo explained last night, foresaw the acquisition of the factory by IRI for the sum of four billion. It was quite agreed upon that IRI would desert the first auction presenting itself instead at the second, which had, precisely, as a base-sum four billion. Regarding the problem of the supplies it was instead decided that they would be sold out in successive phases. The proceeds would have gone to the creditors, less a rate of 30 per cent for administration fee. "What I say is so true —" continued Carollo, "that immediately after this conversation, the directors of IRI came to Palermo in order to form ELTEL. They even succeeded in entering the factory, obtaining that the workers should construct the 'oscillators' commissioned by Nato."

Carollo then added, and this deals with another very important element, that the society of creditors declared itself satisfied with the terms of the agreement. Even the bankruptcy trustee gave his own assent "who made no captious resistance". "What happened between then and today," concluded the ex-President of the Region, "I do not know nor have I been informed." And in this conclusion is gathered a polemic note in comparison with the actual regional government.

Two things are remarkable in Carollo's remarks:

(1) In October the agreement would have been achieved even on the purchase price;

(2) The society of creditors and the bankruptcy trustee would have demonstrated their own satisfaction.

In reality, however, it happened then that IRI (through ELTEL) has continued to speculate for a fall, no longer respecting the obligation taken; but it also happened that the society of creditors and the bankruptcy trustee themselves also backed up, reproposing the problem of the provisions to acquire together with the factory. So that the next bid, set for 3 May, has as a base of five billion notwithstanding that the price of the sole factory has fallen to 3 billion and 200 million (the supplies are valued at 1 billion and 800 million).

Many obviously did not maintain their obligations and this was already known. But Carollo's statement, which spoke of a written agreement, has shifted the debate to a purely political plane.

The Honorable La Torre, present immediately after, has said for example that

> "after this news given by Carollo we must immediately bring this explanation to the Regional Assembly. The Communist Party will propose a new debate and the constitution of a parliamentary commission which will betake itself to Rome to deal with the whole matter."

Feliciano Rossitto, regional secretary of the CGIL, has mentioned on his part "manoeuvers by Raytheon and IRI to tire the workers of ELSI. We have need of clarity" he continued. "The Regional Assembly must clear up what happened in October and what changed afterwards."

Rossitto then faced the fundamental issues of the problem. He stated that the battle for ELSI is, in reality, the battle for Sicilian industrialization, for the economic rebirth of the island, and he admitted that even the unions have to carry out a new strategy, using "the confederations at a national level". What is the most important proposal to come forth from last night's meeting? To obtain, in fact, that the workers of Milan fight for the problems of their Sicilian work friends, is one of the aspirations, almost mythic, of the Southern workers' world. Will the CGIL succeed in realizing this kind of miracle?

Last night's meeting, characterized by Carollo's statements, has not, however, lost its original spirit, which was to demonstrate the solidarity of the whole city to the employees of ELSI. There have been interventions by the Honorable Rosario Nicholetti who has inserted the problem of the electronics industry into the vaster one of the Palermitan economy; of the syndicalists Bellomo, Riccobono, Garofalo, Viola and of Miss Franca Castiglia, who has brought the support of the Palermitan feminine movements.

The sum gathered for the ELSI workers' Easter amounts to approximately 3.5 million. It will be used to form a "resistance fund". From these sums, the workers will draw for a coming trip to Rome. Purpose: a new protest against IRI.

III-23. Photograph of IRI-STET Sign

[Not reproduced]

III-23A. Press Announcement of Takeover by ELTEL, 17 April 1969

[Italian text and English translation not reproduced]

III-24. Minutes of Creditors' Committee on 29 March 1969

[Italian text not reproduced; for another English translation see I, *Memorial of the United States, Annex 60]*

Legal Office,
Bisconti
Rome . . .
Milan . . .

MINUTES OF CREDITORS' COMMITTEE MEETING

On 29 March 1969, a meeting of the Creditors' Committee took place at the premises of the Raytheon-ELSI facility at Via Villagrazia 79 in Palermo. The Committee consisted of the following gentlemen:

Dr. Bruno Lipari, Director of the B.N.L., Palermo — Chairman;
Dr. Ing. Silvio Laurin — member;
Mr. Giovan Battista Riccobono — member;
Mr. Antonio Miserendino — member;
Att'y Giuseppe Bisconti — member;

Also present was the Liquidator, Att'y Giuseppe Siracusa.

The Liquidator advised the Committee of the results of the negotiations with representatives of Eltel for the leasing of the facility and pointed out these essentials:

Price L.150,000,000 per year. Duration 18 months with premature and immediate termination in the case of a judicial sale. Regular maintenance and commissioning at the expense of the lessee. Possibility to bring in new equipment for new types of work. Restoration of the facility in the same condition in which the lessee took it over.

The Liquidator also advised that a third attempt will have to be made at the auctioning of the property, and he asked for a vote on a price reduction for the raw materials.

On the first item, the Creditors' Committee did not vote in unanimity.

Att'y Bisconti voted against the lease since its only effect would be to favor one private party and to make it essentially impossible to sell the facility to any third party other than Eltel; the rent is considerably less than the depreciation of the equipment when used, and despite any precautions by the Liquidator the lease would necessarily involve access by Eltel to Raytheon Company's industrial secrets for whose violation Raytheon Company could hold the Liquidator equally responsible. He added that under these circumstances a decision on the part of the bankruptcy administrators to grant a lease to Eltel would constitute a departure from their very charter which is to safeguard the interests of the creditors and not to favour private parties. The other four members voted in favor of the lease of the facility for a period of between six months and a maximum of one year provided that Eltel purchases at the same time all the raw materials inventoried, at a price of not less than L.1.8 billion. They are also prepared to reduce the corresponding rental fee even though the amount allowed for already appears to fall short of economic considerations.

On the second item, Attorney Bisconti voted against a reduction of the price of the raw materials based on the inventory report, maintaining that the price first considered is excessively low as it is. He pointed out that the best way to sell the material under favorable conditions was that originally intended for the liquidation of Raytheon-ELSI, namely, the separate sale of each individual production line together with the appertaining raw materials.

The other members voted in favor of a sale of the raw materials at a reduced price not below L.1.8 billion, all in one lot at the time the facility is sold. This solution of a sale in one block was opposed by Mr. Riccobono.

Read, approved and signed: B. Lipari; Giuseppe Bisconti; Antonio Miserendino;
Giovan Battista Riccobono; Silvio Laurin;
The Liquidator Giuseppe Siracusa.

This is a true copy of the original: The Clerk (sig. illegible). Palermo, 5 June 1970.

III-25. RAYTHEON EUROPE'S BRIEF IN OPPOSITION TO PROPOSED LEASE

[Italian text not reproduced; for another English translation see **I**, *Memorial of the United States, Annex 62]*

(TRANSLATION OF BRIEF TO THE JUDGE IN PALERMO)

CIVIL AND CRIMINAL TRIBUNAL OF PALERMO

To the Honourable Judge in Charge (Giudice Delegato) of the Bankruptcy of Raytheon-ELSI S.p.A.

Your Honour,

As you know at the meeting of 29 March 1969, the Creditors' Committee in the bankruptcy of Raytheon-ELSI S.p.A. was called upon to express its opinion in relation to the proposed lease of ELSI's plant and pertinent equipment to Eltel S.p.A., an affiliate of Siemens (IRI Group).

The reasons underlying my unfavourable opinion are expressed in the minutes of said meeting in a summary way as required by the needs of concise minutes. I believe it my duty to clarify hereby in greater detail the reasons of my dissent. For such purpose, it is necessary to outline in a summary way the development of events of the last months relating to the ELSI case.

In the course of summer of 1968 there took place various negotiations at which participated also the Curator, Avv. Giuseppe Siracusa, Senator Caron in representation of the Italian Government, representatives of private companies interested in taking over in one form or another ELSI's plant, representatives of IRI, IMI and ESPI.

Said negotiations, in spite of the difficulties that were encountered, were preparing a global solution to the problem of ELSI, which taking into account the serious social problem represented by the unemployment of approximately a thousand persons at the same time protected the interest of the creditors. Said negotiations, and in particular the negotiations with a French group, were abruptly discontinued by the Italian Government after a meeting which took place in Rome on 13 November 1968, following which a press release was issued [by the Italian Government] of which I am attaching hereto a photostatic copy, indicating the decision of the Italian Government to cause IRI-STET to intervene in order to take over the plant of ELSI.

Said decision was received as a triumph in the Sicilian political environment, it was greeted benevolently by the workers of ELSI to such an extent that the Raytheon-ELSI name was taken off the façade of the plant and was replaced with the words IRI-STET which until today, as far as I know, are still on the façade of the plant at Guadagna [location of ELSI plant in Palermo].

STET, which had been designated by the Italian Government for such operation, has formed together with Siemens [a subsidiary of STET] an affiliate in Palermo under the name of Eltel S.p.A. The purpose of Eltel S.p.A. was that of participating at the auction for the purchase of the plant and inventory of ELSI.

In order to facilitate this transaction, above all taking into account the time necessary for completion of the auction sale and the following formalities, the Creditors' Committee expressed a favourable opinion at its meeting of 3 December 1968 in relation to the temporary operation of the magnetrons line in order also to enable Eltel, or Siemens for it, to participate in the supply of magnetrons to Nato, in such a way retaining for ELSI a customer of absolutely primary importance. From the standpoint of the creditors, the temporary operation of the line appeared beneficial in so far as it would have kept high the value of the plant retaining a customer of such importance. The express condition of the temporary operation was the purchase of the plant by Eltel. Raytheon Company, owner of the proprietary rights necessary for the manufacture of said magnetrons, maintained a benevolent attitude with the view of favouring a total solution of the ELSI problem.

All this notwithstanding, at least until the date of the last meeting of the Creditors' Committee and, judging from the Sicilian press until today, there has been no declaration nor any proposal coming from Eltel or the IRI group addressed to the bankruptcy officials, relating to the purchase of the plant.

The *Giornale di Sicilia* of 6 April 1969 reports a statement issued by the Honourable Carollo [past President of the Regional Government of Sicily], to the effect that last fall IRI had agreed in writing to purchase the plant (without inventory) for 4 billion Lire.

IRI, notwithstanding the alleged commitments, has let two auction sales go unattended with the obvious purpose of causing in such a way the price to become lower. The attitude of IRI leads one to suspect that this manoeuvre shall continue for several months until such time as the price of the plant, because of the reductions that the law permits (but does not require) will go down to such a low value that the solution of the serious social problem represented by the one thousand workers of ELSI may also convert itself into an enormous bargain for IRI and into an enormous damage to the creditors of ELSI. The aforementioned decision by the Italian Government, which was communicated to the press through the attached press release of 13 November 1968, has in fact made impossible the participation of private groups in the auctions for the purchase of the ELSI plant (and the fact that interested private parties are mentioning that the provisions of the bankruptcy laws are fully respected because anybody has the right to participate at the auctions, has the taste of a bitter mockery in a country like Italy, the fatherland of law).

In consideration of the decision of the Italian Government to take over the ELSI plant through a group controlled by it and of the attitude taken by the labour unions and of the occupation of the plant by the workers and in consideration of all the actions carried out by the workers to the end that it be IRI to take over the plant in preference to any other group, it would be naive to think that any responsible private group may decide to bid at an auction. It is to be noted in this respect that the international press has given emphasis to the press release of the Italian Government of 13 November 1968 to such an extent that some journals, including also the monthly *Journal of the American Chamber of Commerce for Italy*, had already announced the solution of the ELSI problem through the completed take-over of the plant by IRI.

All this notwithstanding, until today Eltel has not made any offer to purchase. Today, it requests a lease for a period of it seems 18 months without making any commitment as to the purchase at any price.

It is impossible to see what benefit there may accrue to the creditors from the lease. On the contrary, it appears that the lease can only cause damage to the creditors because Eltel, once it has obtained possession of the plant — notwithstanding the provision that may be included in the lease agreement by which the same shall be terminated in the event of purchase by third parties of the plant or part thereof — shall have presumably no interest in purchasing the plant or in any way it shall have no urgency to purchase the plant and a consequence of all this shall be that through successive auctions the price shall be reduced to such a point as to depreciate completely the plant of ELSI. On the other hand a private group which might still think of purchasing the plant or part thereof, knowing of the aforementioned decision of the Italian Government and knowing that IRI is also in the possession of the plant, can only be absolutely discouraged even from taking into consideration such a possibility.

I must add also that the lease of the plant shall make it impossible for the Curator to sell the inventory at any reasonable price. In accordance with a communication made by the Curator, Avv. Giuseppe Siracusa, at the latest meeting of the Creditors' Committee, Eltel is said to have offered to buy part of the inventory at a price of approximately Lire 600 million.

In relation thereto, one cannot avoid observing the following:

(a) the price offered by Eltel is extremely low, especially if related to the value of the inventory determined by the appraiser appointed by the Tribunal, which was itself considered extremely low by the experts in the marketing of electronic products;

(b) inventory can be sold at a reasonable price only to whomever uses the plant; therefore, if the inventory is separated from the plant and if an attempt is made to sell the inventory separately the only result shall be that the inventory will be sold as scrap or that it will be absolutely impossible to sell a substantial part thereof;

(c) in the aforementioned situation, Eltel shall be in a position to impose the conditions at which it may buy the inventory for its own use.

This aspect of the problem was finally seen also by the other members of the Creditors' Committee, who did want to attach a condition to their favourable opinion on the proposed lease, namely, that Eltel must purchase all the inventory even if at a price further reduced of Lire 1,800,000,000.

In the light of the above events, which are known to everybody in addition to having been fully reported by all the press, it is obvious that the proposed lease would have the only effect of favouring a third party, that is to say Eltel, in either acquiring the plant at an extremely low price or even in enabling Eltel to avoid the political and social problem which has been thrown onto it by the Government's decision of 13 November 1968, without purchasing the plant. Indeed, and please pardon me for being too suspicious your Honour, in consideration of the decision announced by the IRI-STET group to build a plant for telephone equipment in Palermo, one does not see why IRI could not in a year and a half or two years approximately, namely, when presumably the telephone equipment plant shall be in being, merely transfer the workers from the ELSI plant to the new plant. For the aforementioned reasons, indeed, if Eltel will not make an offer and hence shall acquire the ELSI plant, nobody else shall participate at the auctions; hence, the lease will be likely extended and certainly in such direction shall be pressed the requests of the politicians and the unions.

I have explained all these reasons in the course of the meeting of the Creditors' Committee of 29 March 1969. While I obtained the consent of all the other members in so far as the analysis of the situation and of the events that have determined such situation are concerned, and while there has been at all the meetings of the Creditors' Committee a unanimous consent in criticizing and condemning the action of the Italian Government and the attempts of the IRI group to impose a solution which lowers the value of the ELSI plant beyond measure, the formal decision of the Committee has been as results from the minutes of the meeting of 29 March 1969. I do not presume hereby to subtract myself from the majority rule, since I remained a clear minority in the Creditors' Committee. The reason which forces me to clarify my position is that I respectfully believe that the Creditors' Committee, as an official organ of the bankruptcy proceedings, expressing a favourable opinion on the lease is abdicating its own function, which is that of protecting the interest of all the creditors (and not only of the creditors who are directly represented in the Committee) and not that of favouring a private party even if for socially valid reasons. It is in this respect that I have spoken of a deviation from the institutional purposes of bankruptcy proceedings.

The Sicilian and the national press have amply documented the occurrence of meetings, of negotiations, of verbal and written agreements, etc., relating to the future of the ELSI assets to such an extent as to justify the doubt as to whether the interested parties think that the official organs of the bankruptcy proceedings are those established by law or instead thereof the meetings of national and regional political authorities, union leaders, representatives of IRI or its affiliates, etc., and as to whether instead of a public auction with all the substantive and formal guarantees of law there shall take place a disposal on a "fire-sale" basis achieved through private negotiations.

Your Honour, I would be naive and not honest if I concealed the difficulties of the situation and above all if I concealed the difficulties of the task which the Curator, Avv. Giuseppe Siracusa, has so ably performed and I wish here to express my absolute esteem of said gentleman. However, in the presence of a series of acts of political interference and of acts of government which have caused this situation, I believe that the official organs of the bankruptcy proceedings must take a different attitude. It was an act of Government that caused the insolvency of ELSI, namely, the illegal requisition ordered by the Mayor of Palermo in his capacity as an official of the Italian Government, which was not revoked by the Prefect of Palermo, who had the duty and the power to so do notwithstanding the requests received; it was an act of Government which, notwithstanding any false appearance of respect of legal procedures, practically has made and makes it impossible for a private group to participate in the purchase of the ELSI plant, namely, the decision by the Italian Government, amply publicized, to cause IRI to intervene in order to take over the ELSI plant. It was also an act of Government, which is about to be formally completed, which has attempted to separate the interest of the workers in so far as creditors from the interest of the remaining creditors in maintaining a high value for the ELSI plant, namely, the decision of the Regional Government of Sicily (allegedly suggested by members of the Rome Government) to guarantee to the workers payment of their termination indemnities, thus separating their lot from that of the other creditors. Today in substance, Your Honour, the threatening statement contained in the letter which the former President of the Sicilian Region, the Honourable Carollo, delivered to the representatives of ELSI on 20 April 1968, is proving to be true, namely,

> *"IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprise shall not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favour any sale."*

In consideration of this situation, notwithstanding the difficulties which one may also personally encounter, I believe it is the duty of the Creditors' Committee to take a different attitude in front of the Government and IRI which permits an adequate protection of the interests of the creditors.

In the course of the aforementioned meeting of 29 March 1969, I insisted again that as an alternative to the sale of the plant together with the inventory, there should be considered also the sale of separate lines. My insistence was due to the fact that when Raytheon-ELSI intended to proceed with an orderly liquidation of its activities (which was made impossible by the requisition) it did consider as the best way to realize a high value for the assets the sale of separate lines, each line comprehensive of inventory, raw material, work in process and finished products. The reason therefor — and I should believe that few people in the world have an experience equal or higher than that of the Raytheon technicians in this field — is that by selling separate lines one is addressing itself to a market of potential buyers much greater than that of any buyers which may be interested in acquiring an entire plant in a predetermined locality that cannot be changed; moreover, the sale of separate lines permits the sale of inventory to the user of the line and therefore to the party which is in need of the inventory and as a consequence thereof at a high price. I realize that an offer of separate lines would be politically an extremely unpopular act and that it might bring about adverse action by the unions such as, for example, the occupation of the plant. On the other hand, it seems to be the only alternative to what will otherwise be a complete depreciation of the assets of ELSI, which will bring about as a necessary consequence a valuation of the bankruptcy in its entirety, of the causes and responsibilities for the same, which has no correspondence with the reality because the bankruptcy and the amount of the liabilities which are not covered through the realization of the price obtained from the assets would be a result not of normal and natural events in bankruptcy proceedings but rather of political impositions and abuses (pardon me for the expression) which were applied over and over without interruption from the spring of last year until today.

Your Honour, I trust that you will understand the reasons underlying my dissent and why I am expressing it outside and beyond my formal participation in the Creditors' Committee. I believe I am compelled to make this clarification and more complete statement of my position by the duties imposed on me by the robe which I ideally wear.

(*Signed*) Avv. Giuseppe BISCONTI,
Representative of Raytheon
Europe International Company
in the Creditors' Committee.

III-26. CURATOR'S APPLICATION TO LEASE ELSI PLANT

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 61]*

III-27. APPEAL OF DECISION TO LEASE

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 63]*

III-28. COURT DENIAL OF APPEAL ON LEASE

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 64]*

III-29. MINUTES OF CREDITORS' COMMITTEE MEETING IN MAY 1969

[Italian text not reproduced; for another English translation see I, *Memorial of the United States, Annex 65]*

On 2 May 1969, at the former Raytheon-ELSI S.p.A. of Via Villagrazi 79, Palermo, a meeting was held by the Creditors' Committee comprising Mr. Riccobono G. Bottute, Dr. Bruno Lipori, Ing. Silvio Laurin, Attorney Egidio Rinoldi sitting in for Attorney Giuseppe Bisconti per attached power of attorney, and Mr. Antonino Miserendino.

The liquidator attorney Giuseppe Siracusa informs the committee that in the production lines of the plant, material in various stages of completion was left and has been there since the shut-down of the operation in March of 1968. This material has been inventoried and appraised at the total value of L.217,300,000.

In the lease agreeement the liquidator obligated himself to remove the said material from the production lines and to have it stored in the warehouse. However, the removal was not possible without certain losses and expenses. The liquidator indicates that the above material valued at L.217,300,000 does not include hardware owned by military authorities which was inventoried and appraised separately at L.24,000,000. For the non-military material inventoried by Ing. D. Benedetto at L.217,300,000, Eltel has offered an as-is purchase price of L.105,000,000. The liquidator invites the committee to express their opinion regarding the purchase by Eltel. Attorney Rinaldi declares that before the committee votes on the possible sale it is necessary to make sure that the material in question is not subject to military secrecy requirements, i.e., classified. Attorney Rinaldi expresses his opposition to the sale in view of the aforesaid and of the following: At least in the case of some items, the material is in various stages of completion and continuation of the production process constitutes, or might constitute, violation of industrial know-how or patent rights exclusively proprietary to third parties. Eltel which is not a co-owner of the bankrupt company, has no right to use the licences and know-how of ELSI. Also, the offer by Eltel was made in contradiction to the provisions established by the Court which authorized the lease, and the lease itself might therefore be revoked. Consequently, Eltel's application represents an improper interference with current court proceedings. The price offered by Eltel is ridiculously low, being considerably below the already underpriced value established in the inventory. Based on information requested from Semiconductors S.p.A. California, ATECC, and Elettrovalvula S.p.A. in respect of the possible acquisition of the discharge-lamp and kinescope lines, with the appropriate materials, the said lines would bring a price corresponding to the appraisal made, and it is therefore difficult to see how Eltel can propose to pay less than 50 per cent of the appraised value.

The offer by Eltel proves, also in respect of the price question, what has been stated by Raytheon Europe International Co. in their memorandum to the Court dated 8 April 1969, and in the complaint submitted to the Court on 10 April 1969, namely, that by virtue of the lease by Eltel that company can dictate the terms of the purchase of the material of interest to them, making it practically impossible to sell the items at a reasonable price. On 3 May 1969 an auction was scheduled for the sale of the entire ELSI operation in one block. The sale was authorized with a formal provision stipulating the terms and conditions.

It is all the more surprising that, contrary to normal practice and to the abovementioned conditions of sale, the application by Eltel could be taken into consideration even by the creditors' committee before the auction was held and before a definite authorization was given for the separate sale of the material in question.

The application itself demonstrates that Eltel operates on the basis of a well thought-out plan which is in essence geared to a maximum devaluation of ELSI's business from which Eltel alone would benefit. It is therefore difficult to understand why despite the resolution and the procedure regarding the sale of the operation, one considers the Eltel request prior to the public auction when such an offer by Eltel can be of advantage to no one but Eltel while it means a clear loss for us. It is the lease arrangement with Eltel which makes it in fact impossible to sell the facility to anyone other than Eltel (or companies of the IRI group), which contributes to the devaluation of the ELSI operation and thus results in a direct loss on the part of the creditors' *(next sentence completely illegible)*.

In voting against the Eltel proposal, Attorney Rinoldi confirms what was the subject of the memorandum of 8 April 1969 and the tenor of the complaint of 10 April 1969 submitted by Raytheon Europe International Co. in connection with the proposal and the provision for authorizing the leasing of the plant to Eltel.

The Eltel proposal on which the creditors' committee was to vote is meant to play a role in a series of governmental measures which, ever since Spring of last year, have in fact been essentially aimed at a confiscation.

Attorney Rinoldi . . . *(illegible)* . . . to Attorney Bisconti of Raytheon Europe Int. Co. The other four members of the creditors' committee, considering the difficulty of selling the material without also disposing of the tools and the fact that this reduces the value of the materials sold separately from the facility itself to a minimum, and also considering the fact that the material has been sitting in the production area for a long time, also that, according to Dr. Santoro, no offer was received from anyone else by the Clerk's office of the Court of Palermo, as of 1.45 p.m., for participation in the auction scheduled for 3 p.m. — the deadline having been 1 p.m. — vote in favour of the sale of the material for the price of L.105,000,000.

Signed: Lipari, Egidio Rinoldi, Ing. Laurin, Riccobono G. Battista,
Antonino Miserendino.

The Liquidator,
(Signed) Att. G'pe SIRACUSA.

BANKRUPTCY RECEIVER FOR SOCIETÀ RAYTHEON EL.SI., S.P.A., 90125 PALERMO, VIA VILLAGRAZIA 79

(Registered mail)

Palermo, 26 April 1969.

Mr. G. B. Riccobono
Palermo (full address in orig.)

Mr. Antonino Miserendino
Palermo

Mr. Silvio Laurin
Palermo.

Raytheon Company
Attn: Att'y G. Bisconti
Rome

Banca Nazionale del Lavoro
Palermo Office.

The creditors' committee will meet on Friday, 2 May 1969, 12.00 noon, at the above address, Via Villagrazia No. 79, to discuss and vote on the following issue:

Purchase by EL.TEL. of all the material currently in the production area, at the price of L.105,000,000. The said material was inventoried and appraised at L.217,000,000. Not included in the sale will be materials subject to military classification and currently in the appropriate production area, valued at about L.24,000,000.

The Liquidator,
(Signed) Att'y Giuseppe Siracusa.

III-30. Curator's Application for Authority to Sell Work in Process

[Italian text not reproduced; for the English translation see **I**, *Memorial of the United States, Annex 69]*

III-31. Newspaper Clippings *re* Unattended Auctions

[Italian text and English translation not reproduced]

III-32. ELTEL Valuation of ELSI's Assets

[Italian text not reproduced]

The Hon. Judge presiding over the Bankruptcy Case of Raytheon ELSI S.p.A.

CONSIDERATIONS

by the Società Italian Telecomunicazioni Siemens S.p.A. relative to the real value of the technical assets of the former Raytheon-ELSI Company.

Premise: ELTEL-Elettronica Telecomunicazioni S.p.A., member of the IRI-STET group and potential buyer of the plant and equipment of the former Raytheon-ELSI facility — disagrees with the appraisal made some time ago by the expert appointed by the president of the bankruptcy section of the Court of Palermo, and with others made earlier for a transfer of ownership of the aforesaid property. These appraisals have in common that they do not reflect the true, provable condition of the facility.

To illustrate, by way of assumption, the principal motives for the appraisals which diverge so drastically from that which ELTEL insists on arriving at, the following comments are presented, concentrating essentially on three points of argumentation:

(1) Statement of *appraisal* — made on behalf of Società Italiana Telecomunicazioni Siemens (majority shareholders in ELTEL) — of the items concerned and of the criteria applied (Chap. I);

(2) Reconstruction (on 31 March 1969) of the *book value* of the above-mentioned technical assets, starting with the last balance sheet of 30 Sep. 1967 of the bankrupt Raytheon-ELSI Co., and appropriate recalculation (Chap. II);

(3) Comparison between these two levels of valuation and the *judicial appraisal*, showing as cases in point the estimated figures for a number of items which constitute the most obvious examples of discrepancies between the conclusions made by the expert and those which are closer to reality (Chap. III).

The following pages will suitably illustrate and amplify these basic points. However, a few general preliminary considerations may be in order, with particular regard to the basic assumptions which prompted a more correct appraisal of the property in question as is obvious from the results of the reconstruction of the accounting records.

It is also underlined that, in both approaches taken in the estimates mentioned above, reference was made exclusively to the theoretical property value while, as would seem to be common business practice, the appraisal of an enterprise (or any segment thereof) should always follow these two guidelines:

- The static or passive value, meaning an appraisal by the so-called analytical method intended to determine the value, at any given point, of all the individual property items;
- The dynamic or economic value, meaning an appraisal by the so-called global method intended to determine the value of the enterprise as a function of its capability to produce income based on its actual past performance and, more so, on its future profit potential.

It is current practice to take a mean value between the property estimate and the profit estimate so as to correct for any possible excess values which could result from the application of only one appraisal method.

In the case here at hand, the global method was not applied, since the largely red-ink results of past operation, the current state of bankruptcy of the enterprise, and the current absence of any prospect for distributable profits of the business in its present form would have led to the conclusion that this Palermo facility *has a negative value*.

In fact, this facility not only fails to constitute a real and actual source of income but, as is shown by the analytical appraisal of the individual property items, this industrial firm — in its present highly precarious state and being in need of technical updating — has indeed deteriorated to a point where substantial expenses and new investments will soon be required to bring the organizational and production system back to the necessary minimum level, and also to compensate for the rapid obsolescence of the technical equipment inherent in this sector of the industry.

The constant need for capital (a third aspect under which the enterprise as a potential source of income is to be assessed) for new major technical investments in the future constitutes yet another reason for a downward adjustment of the estimated value.

Chapter I. Appraisal by Società Italiana Telecomunicazioni Siemens

For appraising the technical assets, the following maximal criteria were applied: *First*, the current value was considered, strictly on basis of market value per items without taking into account any prospective profits as referred to above which in this case would come out negative anyway. Current value refers to the current cost of purchase or new construction minus a deduction for normal wear and tear.

Second, consideration is given to whether the individual items are designed for "general" or for "specialized" use.

The items appraised (except for a few parts eliminated because they are useless for future work programs — see p. 342, *infra*) were most generously taken as functionally integrated into an operating business enterprise, but the valuations would come out different, and lower, if the equipment and machinery were considered and sold as separate, individual items.

With all this taken into account, the appraisal by SIT Siemens, broken down in more detail further below, indicate the following figures:

A. *Land and buildings*		
A. 1. Land	L.360,750,000	
A. 2. Building	L.398,300,000	L.759,050,000
B. *Equipment, machines and tools*		
(see detailed breakdown)		L.1,027,100,000
		L.1,786,150,000

A. *Land and Buildings*

A. 1. Land L.360,750,000

The terrain on which the factory is located has an area of about 48,100 square metres, situated on the eastern perimeter of the city between Via Villagrazia and the deep valley through which runs the Oreto river. The terrain declines toward the river, with a total drop of about 4 metres. The only access to the facility is from Via Villagrazia, a narrow and rough road which would not permit two-way traffic by large vehicles except in a few widened spots.

The entire area of the plot can be subdivided as follows:

1. Area covered by buildings	about	17,050 sq.m.
2. Roofed area (sheds)	about	1,450 sq.m.
3. Factory roadways and courtyards	about	10,000 sq.m.
4. Parking lots and other paved space	about	18,600 sq.m.
5. Steep, unused grades	about	1,000 sq.m.
	Total	48,100 sq.m.

The property has an inclining peripheral zone which is occupied by simple dwellings, and, in between, cultivated fields and lemon orchards.

The zoning plan of the Palermo Community provides for this area a "clean-industry belt" which, however, does not cover all of the land parcels making up the former Raytheon-ELSI complex.

Considering the type of zoning, and on the basis of local comparisons, a price of L.10,000/sq.m. for small lots can be considered reasonable which includes the cost of surveying and the construction of the infrastructure worth about L.2,500/sq.m. For the complete plot of about 48,100 sq.m., a price of L.7,500 per sq.m. can therefore be considered equitable which would thus come to L.360.750.000 for the entire area.

A.2. *Buildings* L.398.300.000

The industrial facility was constructed in increments between 1957 and 1963. As a result, the buildings are of different types of construction and show a lack of organic development and interrelation. The upshot is an array of buildings of extremely diverging styles, with irrationally distributed and, consequently, inadequately functional space. The height of the buildings varies from a minimum of 2.20 metres to a maximum of over 7 metres. The buildings were apparently constructed in a generally sloppy manner. The framing shows no visible cracks with the exception of one junction beam, while widespread damage is evident at the welds between masonry and the reinforced-concrete structure. These damages could in part be the result of seismic tremors. The roofing of the buildings consists of asphalt material which shows widespread water seepage due to age and to mechanical ruptures. The extension joints and flashings between the various building sections were poorly executed and invite equally water seepage almost everywhere. Such water leaks through the roof and probably poor workmanship have caused plaster to come off especially on the ceiling. The overall plaster work is in bad condition. Most of the floors are of asphalt, cement slabs, and red sandstone. With a few exceptions, they are in bad shape. The sandstone is cracked in many places down to the subsurface. Windows and doors are few and small, and generally of poor quality and workmanship. The paint is largely in need of renovation. The sanitary facilities are predominantly located in unventilated areas, and the mechanical ventilation provided is inadequate. The sanitary fixtures and plumbing are insufficient and by now in sad condition.

The cafeteria is equipped with inadequate and worn-out furniture and its hygienic condition is less than good. In general, the many deficiencies of the facility are accentuated by the long time of inactivity.

The following examples further underline a few aspects of the buildings which fall short of meeting the standards for safety and sanitary working conditions established by the law, and which require quick remedial action and considerable outlays prior to resumption of work:

1. workshop sections located in insufficiently high and poorly ventilated rooms;
2. absence of a sprinkler system;
3. basement rooms used for the storage of cardboard boxes and other flammable material;
4. boilers as well as electric generator equipment installed in narrow and scarcely ventilated rooms;
5. workshops with doors too small in relation to the number of people;
6. sanitary facilities in precarious condition, etc.

For a valuation of the buildings the method adopted has been to divide the areas into five categories, in consideration of the characteristics and the degree of sophistication of the areas concerned, their range of possible utilization and the adequacy of furnishings and equipment, as shown below (see attached layouts, sub. A, B, C):

1. rooms with low ceilings, with coarse ("rustic") finish, little or no ventilation, usable only for housing equipment or for the storage of low-value materials;

2. rooms with high ceilings (about 7 metres), with "semirustic" finish not airconditioned nor heated, designed for storage use or heavy shop work not requiring any particular "clean-room" conditions or climate control;
3. rooms similar to those described under 2 above but with a ceiling height of about 4 metres;
4. rooms with fully finished walls and ceilings usable either for delicate work or as factory offices and equipped with air conditioning;
5. rooms fully finished, specially designed for office use, and air conditioned.

For each type of work space the construction cost is indicated below, derived from comparisons with other, similar structures. The valuation is made by reducing the current cost of construction by 30 per cent in consideration of the age of the buildings (about 7 years), and by another 20 per cent (except for the rooms under item 4 for which only 10 per cent is deducted) in consideration of the poor workmanship and of the reduced functionality resulting from the irrational space planning.

Room Type	Area sq.m.	Const. cost L./sq.m.	Total constr. cost, L.	Valuation appraisal %	Valuation appraisal Total net
1	4,730	15,000	70,950,000	50	35,475,000
2	5,520	22,000	121,440,000	50	60,720,000
3	7,190	20,000	143,800,000	50	71,900,000
4	9,160	30,000	274,800,000	60	164,880,000
5	830	60,000	49,800,000	50	24,900,000
Total	27,430		660,790,000		357,875,000

The supportive facilities which constitute an integral part of the plant are appraised as follows:

1. Sheds of metal construction, glazed, with fibre-cement or fibreglass roofing, cement floors

   2,290 sq.m. at L.6,000 L.13,380,000
2. Roadways, walks and courtyards, with crushed-rock subsurface, hot-topped

   10,000 sq.m. at L.1,500 L.15,000,000
3. Levelled and surfaced (unpaved) areas for parking lots and yard space

   18,600 sq.m. at L.500 L.9,300,000
4. Single-floor building for the storage of alcohol and distillation equipment

   110 sq.m. at L.25,000 L.2,750,000

Total L.40,430,000

The resulting total appraisal of the buildings thus comes to L.398,300,000.

B. *Industrial equipment, machines and tools*

It should be stated at this point that the equipment and tools of the Complex-OST-RAX section and of the semiconductor group cannot be counted as part of the property considered since they have for some time been useless economically; they are excluded from our appraisal and remain at the disposal of the liquidator for possible sale elsewhere.

The sections included are as follows:

Section	*Appraisal, L.*
(B1) MEC (Central Shop)	62.474.000
(B2) LAC (Chemical Laboratory)	18.000.000
(B3) DCQ (Quality Control Department)	17.000.000
(B4) MET (Electronic Microwave Tubes)	172.800.000
(B5) MET — Tools	12.000.000
(B6) SCA (Telephone Conductors)	7.500.000
(B7) LAMPS (Lightbulbs)	6.605.000
(B8) TRC (Cathode Ray Tubes)	333.630.000
(B9) Combined Inventory (MET Testing and Control)	43.000.000
(B10) SIM (Technical Service and Maintenance)	316.085.000
(B11) Miscellaneous	11.946.000
(B12) X-Section (tools with third parties)	4.000.000
(B13) Logistic Equipment and Tools	22.060.000
	1.027.100.000

(B1) *MEC-Section* (Main Shop) L.62.474.000.

The bulk of the equipment and tools belonging to this section is in bad repair and, with a few exceptions, of rather mediocre quality. The latter is confirmed by the considerable, expensive repair work needed for putting these machines back into operation. Many punch presses and cut-off machines are not equipped with the prescribed safety devices according to the accident prevention standards of ENPI. Some of the machines were acquired in 1961, according to the records, but the imprinted year of manufacture shows 1959.

The appraisal was based on assumed market values and, in only a few cases, on the degree of fair wear and tear.

(B2) *LAC Section* (chemical, metallographic and spectrographic laboratory) L.18.000.000.

All instruments and tools were subjected to physical-analytical examination. The quality and condition of the equipment were found to be satisfactory. The appraisal was based on operating condition.

(B3) *DCQ Section* (Quality Control Department) L.17.000.000.

All instrumentation was subjected to a physical-analytical examination, pointing up equipment of good quality and universal utility. The appraisal was based on operating condition which was found to be generally good.

(B4) *MET Section* (Electronic Microwave Tubes) L.172.800.000.

An analysis was made of physical consistency of the equipment, pointing up the presence of items which have been in use for many years. In general, the appraisal was based on operating condition; for a few items (delay line modulators), their special nature was taken into account, where they were designed for production work which by now can be considered outdated. For the chemical apparatus, showing many damages by breakage, corrosion, etc. — due also to inactivity — the appraisal was based on the assumed market value. A few equipment items intended for previously abandoned production work (electronic kitchen ranges) were not included in the appraisal.

(B5) *MET — Tools Section* (equipment and tools for electronic microwave tools) L.12,000,000.

These are equipments and tools whose working condition can be judged only in actual operation. In view thereof, after verification of their physical condition, a global estimate was made.

(B6) *SCA Section* (low voltage telephone conductors) L.7,500,000.

This is technically obsolete equipment for which the assumed market value should have been taken. However, in view of the fact that for certain production activities, SIP could still use such equipment, the appraisal was based on operating condition.

(B7) *LAMP Section* (light bulbs) L.6,605,000.

A physical examination was made of the individual equipment items. These items were used for production work already abandoned prior to the shutdown, and the appraisal was therefore based on assumed market value.

(B8) *TRC Section* (cathode ray tubes) L.333,630,000.

The equipment had been purchased in 1959/1960 from Selit S.p.A., from Thomas Electronic and, to a lesser extent, from other specialized American suppliers. The testing equipment, however, had been acquired second-hand from Raytheon USA. The reactivation and the technological updating of the equipment will require an overall investment of the order of L.200-250 million. An analysis was made and the appraisal based on operating condition, under deduction of the cost installation (L.50 M) and of the lamination equipment (L.22 M) taken down some time ago and now largely irretrievable. The conveyor system was appraised at the assumed market value.

(B9) *Combined Inventory Section* (electronic microwave tube and control equipment) L.43,000,000.

Each individual item was examined. The instruments which are universally usable for testing and control and a few test ovens in reasonable shape were appraised on the basis of their operating condition. The chemical equipment and other instruments were largely found to be in a state of deterioration and were appraised at the assumed market value.

(B10) *SIM Section* (Equipment service and maintenance) L.316,085,000.

(1) The capital equipment and smaller machine tools for maintenance are largely vintage items and, for reactivation, require considerable investments for maintenance and repair by specialized contractors. The large equipment consists of heterogeneous types from diverse suppliers. The electrical tools just barely meet minimum standards and offer no guarantee for continued performance. The array of equipment on hand betrays the absence of an organized plan. In fact, the items seem to have been made available piecemeal whenever the need came up. It was also impossible to check their functional value since the plant was idle. The appraisal was generally based on operating condition.

(2) The central power equipment was appraised on the basis of operating condition. It is stressed that the reactivation of the entire facility must be viewed in light of the original condition for the restoration of which it may

be necessary to discard some of the main equipment which would mean the replacement of a considerable segment of the central power system.

(B11) *Miscellaneous* L.11,946,000.

This sector comprises the most varied items which to examine was only partly possible. For the equipment of universal utility and for partitions (of wood, glass and metal) their condition determined the assessment while for the "sundries" the appraisal was based on assumed market value.

(B12) *Y-Section* L.4,000,000.

These are dies, moulds and tools with third parties and thus not available for a physical examination. The appraisal necessarily had to be done by way of a lump assessment.

(B13) *Logistic Equipment* L.22,060,000.

This was appraised on the basis of operating condition. These are tools, furniture and accessories for offices and for service functions, found to show signs of long use and to be in bad condition.

Chapter II. Financial Review

The financial reassessment referred to in the Premise above is summarized in the following tabulation:

	Net Value	*Reassessed Value*	
In L.1,000's	ELSI Statement 30 Sep. 1967	After ded. fiscal recovery transfer and with amort. by 31 March 1969	Elimination of unacceptable 20% increase
	(1)	(2)	(3)
Land	166,969	166,969	166,969
Buildings	809,142	670,012	670,012
Subtotal A	976,111	836,981	836,981
Equipment and machines	4,181,344	2,146,722	1,788,936
Coating (electrolyt.) booths	42,950	22,910	19,092
Furnaces/burners	262,467	66,130	55,108
Various tools	222,387	34,275	28,562
Furniture + log. equip't	113,564	43,352	43,352
Subtotal B	4,822,712	2,313,389	1,935,050
Subtotal A + B	5,798,823	3,150,370	2,772,031
Motor vehicles	17,165	6,993	6,993
Total	5,815,988	3,157,363	2,779,024

Re Column 1

This shows the values (in L.1,000) of the various property categories as stated in the last official balance sheet of the bankrupt Raytheon ELSI and referring to fiscal year ending 30 September 1967. The said balance sheet shows under assets a total of L.7,086,281 K in technical property, under liabilities a sinking/depreciation fund of L.1,270,293 K, thus arriving at a net value of L.5,815,988 K.

Re Column 2

For each individual property category the relative values were reconstructed, eliminating first of all the L.463,597 K in "fiscal appreciations" representing fictitious value increases which are in no relation to the effective property value, and the L.1,239,083 K in transfer (under assets and liabilities) made in the last fiscal year, which transfers relate to a balance in equal amounts in fixed assets and corresponding depreciations for fully amortized items.

The depreciation allowance as at 30 September 1967 was recalculated under application, for all company operations, of the straight single rates used during the years without taking into account accelerated depreciation, which is important in the electronics business more than elsewhere. Raytheon ELSI had not written off any depreciations between 1 July 1960 and 31 December 1962 while in other fiscal periods, especially between 15 August 1956 and 30 June 1960, reduced depreciation rates were applied. The depreciation fund was updated under application of the single straight depreciation rates for the period 1 October 1967 to 31 March 1969.

This revision of the accounting records, correct in every respect, brings the total net property assessment to L.3,157,363 K, differing from the total value per balance sheet (column 1) by L.2,658,625 K. This difference can be broken down as follows:

L.1,221,889 K	for charging straight simple-rate depreciation up to 30 September 1967;
L.973,139 K	for depreciation, always at simple straight rates, during the period 10 October 1969 to 31 March 1969;
L.463,597 K	for appreciation credits unsupported by any real increase in property value.

Re Column 3

The examination of the accounting records revealed that, with the only exception of the buildings, furniture, utility equipment and motor vehicles, the company unjustifiably added to the remaining amortizable items shown under assets at purchase price (already including duty, transportation and packing) plus installation cost, an increase in value calculated at 20 per cent covering the assumed general cost of administration (G and A or, in Raytheon ELSI's terminology, S.G.A.). This allowance under property assets corresponded to an apparently equivalent reduction in the annual cost of operations. Deducting from the figures in column 2 the amount corresponding to this totally arbitrary 20 per cent increase in value which is unjustifiable from the administrative point of view, one arrives at a new value of L.2,779 M. Incidentally, it should again be underlined that in such financial statements no use is made of the accelerated depreciation method (Art. 98, T.U.) which is particularly important, or rather a must, in the type of business in which ELSI was engaged, in view of the rapid technical obsolescence of the industrial equipment involved.

The total appraisal thus arrived at in column 3 still does not reflect a correct financial picture of the technical value of the bankrupt Raytheon ELSI facility. An extensive analysis was made of the investment during the last year of operation (1966/1967), with a less detailed examination of the preceding fiscal year (1965/1966). It covered the type of and accounting for orders for new equipment which was entered under assets and which constituted practically all of the incremental technical assets during the mentioned two fiscal years. It was thus possible to ascertain that in determining the figure to enter for incremental property, one always tended to use ever higher figures for such annual increments, above and beyond the already unjustifiable practice of starting off with a 20 per cent overvaluation (for G and A) of incremental equipment and machinery. The essential items brought out in the analysis of a few such new-equipment orders during the 1966/1967 and 1965/1966 fiscal periods are summarized in the attached statement, section D. More details relative to the orders analyzed can be submitted if necessary. The spot examination of the new equipment orders in 1966/1967 has pointed up, besides the already mentioned 20 per cent over valuation to cover G and A, value figures marked up by at least 30 per cent. For 1965/1966, it was demonstrated that nearly all of the incremental figures examined reflected allowances for operating expenses, costs which should have been charged against the appropriate account and whose entry under assets appears totally unjustified. It was not possible to perform an analogous audit of the orders in the fiscal years preceding the two mentioned since the accounting records available were insufficient. Even if one takes into account the depreciation rates, mentioned above, for the period 1 October 1967/31 March 1969, it can be reasonably stated that at least 15 per cent of the total technical assets per column 3 (land and motor vehicles excluded), meaning about L.400 M, constitute the artificial increase in value. Consequently, a recalculation of the assets of the bankrupt Raytheon ELSI facility — performed also in accordance with the provisions of Article 2425cc — would lead to a total value certainly not higher than L.2,400 million.

From the total of L.2,772,031 K (column 3 further above), representing revised figures (deducting 20 per cent for G and A) for the asset balance, we would arrive at the values shown below after adjusting for the said mark-ups (valuated incorrectly at 15 per cent):

In L.1,000	*Value per column 3*	*15% Difference*	*Net value after deducting 15%*
Land	166,969		166,969
Buildings	670,012	100,502	569,510
Equip't., Mach., tools	1,935,050	290,256	1,644,794
Total*	2,772,031	390,758	2,381,273

* This obviously includes the equipment and tools of the Complex, OST, RAX and Semiconductor divisions.

Chapter III. Conclusions

4. Comparison between the revised value and the SIT Siemens Appraisal

A comparison between the updated, revised values (with the above 15 per cent deducted) and the estimate made by SIT Siemens (Chap. I) is made as follows:

In L.1,000	*Value per column 3 minus 15%*	*SIT Siemens appraisal*	*Difference*
Land	166,969	361,000	+ 194,031
Buildings	569,510	398,000	− 171,510
Equip't., mach., tools	1,644,794	1,027,100	− 617,694
Total	2,381,273	1,786,100	− 595,173

The following summarizes a few major considerations and reasons for the difference between SIT Siemens' appraisal and the revised values shown above which, for equipment and machinery, are derived from the factors set forth below:

(A1) *Land*

A comparison between the values per accounting records and the values estimated in the appraisal was considered pointless in view of the continuous increase in the price of industrial land during the past decade. Reference is therefore made to the criteria outlined in Chapter II, paragraph A1 ("land").

(A2) *Buildings*

The book values cannot give a realistic reflection of the actual value of the buildings when one considers that the applied fiscal depreciation rates do not correspond to the actual physical depreciation of the items concerned, the condition in which these buildings are, being truly precarious (see Chap. I, para. A2); also, when one considers that the physical arrangement and the type of construction, ill-conceived and antiquated, now makes these buildings relatively unsuitable for the implementation of modern production techniques especially in an area as much in the vanguard of technology as electronics.

The valuation of the buildings made in the official or judicial survey appears to be quite far removed from the realities of business, in that the total value attributed to the buildings proper is more than twice that established in the above review of the accounting records and even more than one-third higher than the original purchase/construction price. It seems unreasonable therefore, to apply to this item the rates per square metre or cubic metre arrived at in the judicial appraisal since these would constitute valuation rates corresponding to the construction cost of new, modern industrial buildings far superior to those in question whose state of serious decay is obvious to anyone.

(A3) *Equipment, Machinery and Miscellaneous Tools*

The differences between SIT Siemens' appraisal and the values per review of the accounting records are shown in the attached tabulation, section E.

Before examining the more significant differences one must remember that (as already said further above) the relative value of the items in the Complex-OST-RAX-Semiconductor section and of those in Rome and Milan (at a total of L.439,884 K) must be deducted from the total difference, since Eltel cannot in any way be interested in taking over these items which are left for disposal by the liquidator who can sell them directly.

For the equipment Eltel can take over, the difference is thus reduced (as shown in the tabulation, section E) to about L.177 million, all of which is attributable to kinescopes (picture tubes). In that latter sector it is possible, however, to identify a pattern of significant differences which are shown in the attached schedule, section F. The criteria applied by SIT Siemens for the valuation of the TRC sector (CRT = cathode ray tubes), already mentioned in Chapter II, paragraph 11, are principally based on the condition of the items, with reference also to analogous, more modern equipment currently on the market. The divergence between the net values per accounting review and the SIT Siemens valuation, outlined in the attached listing, thus makes it evident that the ordinary, straight-line depreciation method applied to the items in this sector was not sufficient to cover the actual technical and technological obsolescence of the equipment concerned. The aforegoing considerations relative to the differences between the net values per accounting review and SIT Siemens' appraisal serve to point up, for the items to be taken over by Eltel, the essential validity of the valuation given in Chapter I

(L. 1.786 M) and its strict overall adherence to the market value of the items to be taken over.

B. Observations on the Judicial Survey

Before concluding this report it seems necessary to make reference once more to the judicial survey, apart from what has already been said further above regarding the factory buildings, to point up the perspective from which the judicial survey was made.

In scanning through the appraisal figures for equipment machinery, tools, etc., appearing in the said survey, one was able to find a few particularly salient discrepancies in terms of both the financial aspect and the methodology applied, reviewed as follows:

Item 03170 delay line modulators, 80KV, 120mA, for magnetrons, appraisal	L. 36.0 M
Item 03173 delay line modulators, 80KV, 120mA, for magnetrons, appraisal	L. 34.0 M
	L. 70.0 M

These two modulator items were manufactured in-house in 1967; the total cost of assembly according to the books was:

item 03170	L. 28 M		
item 03173	L. 26 M	L. 54.0 M	
minus amortization which differs		L. 10.8 M	L. 43.2 M
from the figure in the survey by			L. 26.8 M

Item 03555 magnetron test modulator, appraised at	L. 5.0 M
Made in-house in 1962 at a total cost of	L. 5.0 M
After deduction of amortization the remaining value would be	L. 1.5 M
Item 4133, Heliarc welder, appraised value	L. 1.3 M
Purchased in 1963 for	L. 1.2 M
After amortization depreciation, the remaining value is	L. 2.5 M
Item 2631, 4-position chute, appraised at	L. 3.5 M
It was found that the previous management had already labelled this equipment as scrap	Scrap value
Items 02775 2776, two furnaces for vacuum treatment, 1800, appraised at	L. 22.4 M
This is the current purchase of similar equipment. The furnaces on hand were installed in 1963. Deducting depreciation (L. 110 M), the remaining maximum value would be	L. 6.5 M
Items 5167 to 5319:	
154 removal carriages with motorized pumps and "traps", appraised at	L. 107.8 M
The valuation of a completely equipped carriage by Raytheon ELSI technicians was L. 300 K each, for a maximum total of	L. 46.2 M
Item 05065, 05057, 05111, etc., conveyors, appraised at	L. 40.0 M

This would be a cost of L. 29.5 K metre. The current purchase price of identical equipment, new, is L. 15 K metre.

The resulting total is	L.20.3 M
Incremental cost of installation, appraised at	L.49.6 M
Considering a cost of L.5 K/metre (current quotations), a new installation would be	L.7.0
The total for the conveyor equipment is:	
Per appraisal	L.89.6 M
effective value	L.27.3 M
variance	L.62.3 M
Old lamination equipment, appraised at	L.22.0 M
It is easily seen that this equipment does not exist anymore, except for a few kilograms of scrap	Scrap value
Item 07045, electrolyzer 280/D/70C, appraised at	L.59.0 M
It is out of service, is six years old (bought in 1963) and cannot be used for danger of explosion. Reconditioning would cost about L.18-20 M involving more than a month's work.	
The previous administration already considered this equipment as useless and uneconomical to operate and had it replaced with a smaller unit (07045) found adequate for the job. Its power supply was used for the smaller unit which put the said larger equipment out of commission. It can be sold for scrap value only	Scrap value
Items 7791 to 7832, Barbieri airconditioning equipment, appraised at	L.100.0 M
Requires repair and maintenance work estimated at L.30 M.	
The current price of a similar system in operating condition is:	L.60.0 M
The assessable value is thus	L.30.0 M
Items 07636 and 7637, two Ingersoll compressors, appraised at	L.4.1 M
Found unusable. The old Raytheon ELSI administration already considered them unserviceable and had them replaced with other equipment	Scrap value
Item 07525, acetone distillator, appraised at	L.1.0 M
The previous administration had it shelved and prohibited its use because of its dangerous condition	Scrap value
Items 08861/08864, four Hobart converters, appraised at	L.2.0 M
Already taken out of commission by the previous administration and replaced with others with steel tubes of different diameters. Appraised at L.12 M for 3,400 metres, L.24 M for 8,000 metres, total appraisal	L.36.0 M
Actual current value is about L.1,500/metre including installation, total	L.17.0 M
Electrical wiring (cables), appraised at L.2,000/metre for 35,000 metres	L.70.0 M
Current value, installed, not more than L.1,000/metre, total	L.35.0 M
Lighting, appraised at L.5,000 each for 1,800 lamps	L.9.0 M
Actual current unit price is L.2,500, totalling	L.4.5 M

C. Concluding Observations

On the basis of the general considerations contained in the introductory part of this report, it is deemed necessary to add a final observation to underscore that the base price for the auction covering the assets of the bankrupt Raytheon ELSI operation appears to be unrealistic. As said above, the valuation made by SIT Siemens considered the individual items as functionally integrated in a going industrial operation. Consequently this did not take into account that the buildings and equipment were left in a state of abandonment for over a year during which not even the most elementary preservatory maintenance work was performed. Ordinary maintenance of this type had been negligent and insufficient for several years.

No consideration has yet been given — and this point must be underlined as particularly important — to the enormous cost to be incurred by the future owners in cleaning up, repairing, refurbishing and restarting the production facility of the former Raytheon ELSI Company. This regeneration cost will certainly amount to not less than 2-300 million lire, and the job will take many months. Needless to say that a program designed to bring about a gradual economic recovery of the industrial facility must involve either a massive reconversion of the existing production along the line of updated electronic technology, which would require a substantial restructuring of the equipment, or the transfer to Palermo, from other facilities, of new equipment and tools which would create jobs for a few hundred unemployed workers.

Società Italiana Telecomunicazioni.
Siemens S.p.A.
(Signature)

III-33. ELTEL Announcement of Offer to Buy at 3.2 Billion Lire

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 68]*

III-34. ELTEL Offer to Buy at 4 Billion Lire

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 70]*

III-35. Minutes of Creditors' Committee Meeting of 6 June 1969

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 71]*

III-36. Court Authority for Fourth Auction

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CIVIL COURT OF PALERMO

ORDINANCE FOR THE SALE OF THE FACILITY, RAW MATERIALS AND SEMIFINISHED GOODS OF THE BANKRUPT RAYTHEON ELSI S.P.A.

The Court

Having read the request by the liquidator/receiver to proceed with the sale of the electronics company Raytheon ELSI S.p.A. of Via Villagrazia in Palermo, including the bankrupt company's property as well as its raw materials and semifinished goods but excluding materials for the production of semiconductors as listed in the inventory sheet;

Having reviewed the technical-survey report of 11 October 1968 by Prof. Mario Puglisi which serves as a reference relevant to the facility, equipment and machinery; the inventory statement with attached exhibits which serve as a reference in respect of the description and valuation of the raw materials and semifinished goods with the exception stated above;

Having read the technical advice by Prof. Mario Puglisi of 31 May 1969 which disputes the claim that the sale of some of the raw materials and semifinished goods as operational parts could constitute a violation of industrial secrecy (conventions);

Having reviewed the application presented by ELTEL in which the latter declares being prepared to acquire the facility with all its supplies, including the finished products, for L.4 billion;

Having considered that it is both reasonable and in the interest of the creditors to consent to the request by the liquidator/receiver to exclude from the sale the raw materials, semifinished and finished products related to semiconductor production also in view of the fact that these are finished products and basic materials of no use to a buyer intending the fabrication of new types of finished goods;

Having considered that the auction arranged for 3 May 1969 for the sale of the facility and supplies remained without bidders;

Having considered that the base price for the sale of the facility may be set at L.3.2 billion and that for the sale of raw materials and semifinished goods may be set as low as L.800 million; and

Having noted the favorable opinion of the creditors' committee relative to the sale of the facility together with the raw materials and semifinished goods and their willingness to settle for the price last stated, as expressed on (date illegible):

Therefore Orders

To proceed with the sale, by public auction and to the highest bidder, of the electronics firm Raytheon ELSI S.p.A. located on an area of land about 48,103 square metres in size and accessible from Via Villagrazia No. 79, registered in deed No. 51345 of the Palermo NCT, sheet 72 section 203 part b, and section 204 part b, sheet 73 sections 85, 307, 225, 226, 230, 233, 231, 234, 455, 456, bordering in the north on the Oreto river, in the south on Via Villagrazia, in the east on Cassina and in the west on Guajana, comprising buildings, equipment, machinery, various tools and implements for production of cathode ray tubes, microwave tubes, X-ray tubes, conductors, semiconductors and complex components as described in the technical report by Prof. Ing. Mario Puglisi dated 11 October 1968 which is to be considered repeated and transcribed in full as an integral part of the record;

To also proceed with the simultaneous sale of the raw materials and semifinished goods on hand at the facility, and in general warehouses in Palermo (excluding those items which are intended for semiconductor production) which belong to the said electronics firm and are described in the attached inventory list.

The sale will be subject to the following limitations:

1. Exclusion of all items claimed by third parties as well as raw materials and semifinished goods disposed of by the liquidator or used for maintenance purposes and therefore not available. Exclusion of all the raw materials and semifinished goods intended for semiconductor production. Exclusion of all items not physically on hand at the facility except those at the (Palermo) general warehouse.
2. Prior to the auction, the buyer must inspect, or have inspected on its behalf, the facility with all its buildings, machinery, equipment, tools and furnishings as well as all raw materials and semifinished goods to ascertain their current condition. The presentation of a bid will be considered as confirmation that such inspection has been made so that the successful bidder cannot under any circumstances apply for a price abatement or indemnification, there being no guarantees given (see also Art. 1487, Civil Code).
3. Exclusion of all finished goods, including rejects, wherever they may be located, of all motor vehicles, equipment of the Milan and Rome office: goods consigned and delivered to customers, items furnished to agents against deposits, and all materials and tools owned by Nato (Administrative Bureau) and located at the factory.
4. The sale of the facility with land, buildings, equipment, tools and machinery as well as raw materials and semifinished goods will be on an "as-is" basis, with no responsibility or guarantee on the part of the liquidator in connection with direct or indirect fees, obligations, liens, or charges.

The sale shall be made in one single lot subject to the following conditions:

The auctioning base price is four billion lire of which L.3.2 billion covers the electronics facility and L.800 million the raw materials and semifinished goods.

To participate in the bidding the offerors must first pay the amount of L.350 million as a bid bond plus L.480 million for pre-established expenses. Competitive bidding must be in increments of not less than L.6 million of which L.5 million will go toward the facility and L.1 million toward supplies.

The auction sale is scheduled for 12 July 1969 at 10 a.m. in the public auditorium of the third civil department of this Court, presided over by the judge assigned to this bankruptcy case.

The bidders must pay the above specified bond and expense amounts by 9 a.m. of the day scheduled for the auction, at the Clerk's Office (bankruptcy section) of this Court, in the form of official legal deposit. Within thirty days after adjudication, the successful bidder must come up with the full bid price by paying the difference between the said price and the bond deposited, in the same form as indicated above.

The buyer takes possession of the property, the raw materials and the semifinished goods on the day the transfer-of-ownership decision is issued in accordance with Article 586 of the Code. All the expenses connected with the sale including sales tax and property-transfer fees will be borne by the buyer.

The unsuccessful bidders will receive back the bond and expense deposit paid by them. For three consecutive days prior to the sale, a notice will be posted on the bulletin board of this court containing all the provisions of this ordinance, with an identical notice appearing in the Official Newspaper of the Sicilian Region in the name of the Clerk.

The liquidator will furnish an abstract of this ordinance to the creditors with outstanding claims having the right of pre-emption on the property, as well as possible hypothecary creditors, who have registered at least two weeks prior to the date scheduled for the auction.

An abstract of this ordinance will be published in the name of the liquidator in the following papers: *24 Hore*; *Il Globo*; *Il Corriere della Sera*; *Il Giornale di Sicilia*; *Die Telegrafe* of Amsterdam; *Le Monde* of Paris; *Frankfurter Allegemeine* of Frankfurt/Main; *Financial Times* of London; *Nihonkeiza Shimbun* of Tokyo; the *New York Times*; and *Le Soir* of Brussels. The abstract to be published will be issued in Italian for the Italian newspapers, in French for the Paris and Brussels newspapers, in German for the Frankfurter paper, and in English for all the other newspapers mentioned.

Palermo *(date illegible)*

The Clerk — The President Judge

(Signature) — *(Signature)*

(handwritten footnotes illegible)

III-37. APPEAL TO BANKRUPTCY COURT

[Italian text not reproduced]

CIVIL AND PENAL COURT OF PALERMO

THE HON. JUDGE IN THE BANKRUPTCY CASE OF RAYTHEON ELSI S.P.A.

APPEAL

In opposition to the ruling made by the Court in the bankruptcy case of Raytheon ELSI S.p.A., on 7 June 1969.

Raytheon Europe International Company, through Attorney Giuseppe Bisconti special procurator by power of attorney issued on 28 August 1968, certified by Notary Public George B. Klim on 4 September 1968 and legalized by the Italian Consul-General in Boston, F. Tonci Ottieri, on 11 September 1968; defended by the said Attorney Giuseppe Bisconti of the Court of Rome and represented by Attorney Francesco Calamia of the Court of Palermo by appropriate proxy (see margin) at whose office at Via Napoli 84 in Palermo he will be domiciled pending completion of the proceedings hereby initiated

(In margin: In my capacity of special procurator of Raytheon Europe International Company I hereby delegate power of attorney to Mr. Francesco Calamia, attorney at law, to represent the said Company as legal proxy in all the phases and aspects of these proceedings, and I shall be domiciled in the legal sense at his office at Via Napoli 84, Palermo. Signature and certifications.)

Hereby states

- that Raytheon Europe International Company (hereinafter called "REIC") is a creditor of the bankrupt Raytheon ELSI S.p.A. (hereinafter called "ELSI") with unsatisfied claims against the latter;
- that REIC is represented in the creditor committee of ELSI;
- that the ELSI creditor committee, in a meeting on 6 June 1969, was asked to agree to a proposal by the liquidator/receiver, Attorney Giuseppe Siracusa, which related, *inter alia*, to an offer by Eltel submitted to the Court for the acquisition of the ELSI facility and its assets for the amount of L.4,000,000,000 (four billion lire), with an auction to take place on 12 July 1969 for the sale of the said facility and assets at the minimum price of L.4 billion of which L.3.2 billion would cover the buildings and equipment and L.0.8 billion would cover raw materials and semifinished goods, excluding those intended for the production of semiconductors and excluding all finished goods;
- that in the said meeting the creditor committee members expressed their respective opinion as follows: two members favourable, the President abstained, the undersigned (in the above-mentioned capacity) was against it;
- that on request by the liquidator, the Court decided on 7 June 1969 to proceed with the sale by public auction, on 12 July 1969, of the facility equipment and tools of ELSI at the price and under the conditions indicated above. In consideration of the above, Raytheon Europe International Company, on its own behalf as a creditor and in the interest of all the other creditors of ELSI, submits its

Appeal

against the ruling made by the Court in the bankruptcy case of Raytheon ELSI S.p.A. on 7 June 1969, for the following reasons:

1. Reference is made to the memorandum by the Appellant dated 8 April 1969 and to the appeal by the same dated 10 April 1969, which he incorporated in full in the appeal here submitted.

2. The events following the said memorandum and appeal unfortunately confirm what was said in the same, to the effect that *the lease arrangement makes it impossible to sell* the facility or individual segments thereof *to third parties* other than Eltel or other affiliates of the IRI group. This was demonstrated by the result of the last auctioning attempt of 3 May 1969 which saw no bidders, and it will be demonstrated again at the auction attempt scheduled in the decision of 7 June

1969, which, as can be expected with certainty, will see no bidder other than Eltel or an IRI affiliate, for the reasons that led to the lease.

3. *The lease has contributed to the reduction in value* of the ELSI business as is evident from the price reduction (in relation to the substance) established in the ruling which is the subject of this appeal.

4. *The lease has enabled Eltel to dictate the selling price.* After having presented an "irrevocable" offer (yet on noncommittal terms) for the acquisition of the facility for L.3,205,000,000, Eltel submitted to the Court, on 27 May 1969, another offer (this time not only noncommittal but not even "irrevocable" anymore) to acquire the facility and all its assets for the amount of L.4 billion. Disregarding the small difference between the Eltel offer and the price proposed by the liquidator, the base price for the auction scheduled for 12 July 1969 is essentially that indicated by Eltel.

5. For the reasons mentioned in the memorandum and the above-referenced appeal, *Eltel's sole reason for the lease was and still is to assure Eltel of a favourable position for the acquisition of the ELSI business, with substantial disadvantages for the creditors.*

6. The *sale* scheduled in the ruling against which this appeal is directed because of the *timing and the conditions* involved, is *not in the interest of the creditors* because:

(a) it reduces the price to a point where the registered creditors cannot hope to recover their money; *(b)* it is scheduled at too short an interval from the preceding auction attempt (it should be noted that four such auction attempts were scheduled within a period of less than six months); *(c)* insufficient efforts have been made to sell the facility by segments, i.e., individual production lines, and no published announcement was ever made regarding the possibility of selling the plant in segments. On the contrary, it seems that a very large German corporation had expressed an interest in the acquisition of the very valuable microwave segment the inventory of which is valued at about L.1.5 billion, but was discouraged by people in government circles on the basis of the suppositions made during the creditors' committee meeting on last 6 June where the Appellant heard about it; *(d)* it provides for the sale at a price below that established for the preceding auction in clear contradiction to the justification given for the lease to Eltel which asserted that the lease would permit a sale of the facility at a higher price for reasons of greater operational efficiency.

7. The offer by Eltel of 27 May 1969 is in no way juridically binding and thus leaves that company an option as to whether or not to bid in the auction or to justify a no-bid for any given reason (for instance the small difference between the Eltel offer and the liquidator's proposed figure covering the assets). Within the framework of the various actions taken by the Administration which have caused the insolvency and consequent bankruptcy of ELSI, and of the circumstances that have prevailed to this date, *the net effect of Eltel's offer will be to discourage any private entrepreneur from making a bid in the auction* for the acquisition of the ELSI business once it is publicly known that State agencies are willing to take over the ELSI facility and operations which, in essence, *constitutes a confiscation as far as the private businessman is concerned.*

8. *The only and immediate effect of the lease*, within just a few weeks, *was a reduction in price* of the ELSI facility and its assets, with the risk, for even the privileged creditors (except for the employees of ELSI whose future was guaranteed by the Sicilian Regional Government, that if Eltel should not live up to its obligation (albeit moral rather than legally binding)) to make a bid in the auction on 12 July 1969, the final price would be so much lower.

Request

It is requested that, independent of the appeal submitted to the Court on 9 June 1969, the ruling against which this present appeal is directed be revoked immediately.

Palermo, 9 June 1969.

(Signed) Attorney Francesco CALAMIA.

(Handwritten addendum of 20 June 1969 illegible)

III-38. APPEAL TO COURT OF PALERMO AND ADVERSE DECISION

[Italian text not reproduced]

CIVIL AND PENAL COURT OF PALERMO

APPEAL

AGAINST RULING BY THE COURT DATED 7 JUNE 1969 IN THE BANKRUPTCY CASE OF RAYTHEON-ELSI S.P.A.

Raytheon Europe International Company, in the person of Attorney Giuseppe Bisconti having special power of attorney issued on 28 August 1968, certified by Notary Public B. Klim on 4 September 1968 and legalized by F. Tonci Ottieri, the Italian Consul-General in Boston, on 11 September 1968, defended by the said Attorney Giuseppe Bisconti of the Bar of Rome and represented by proxy (see margin) by Attorney Francesco Calamia of the Bar of Palermo at whose offices, at Via Napoli 84, Palermo, it has its elective domicile for the purpose of the proceedings hereby instituted.

(In margin: In my capacity of special procurator of Raytheon Europe International Co. I hereby delegate power of attorney to Att'y Francesco Calamia for the representation of the said Company as their legal procurator in these proceedings, for which purpose my elective domicile will be at his offices at Via Napoli 84, Palermo. Signed: Giuseppe Bisconti. Certified: *(illeg.)*).

Whereas, Raytheon Europe International Company (hereinafter referred to as "REIC") is a creditor of the bankrupt Raytheon-ELSI S.p.A. (hereinafter called "ELSI") and duly recognized as such;

Whereas, REIC is represented in the Creditors' Committee of ELSI;

Whereas, the ELSI Creditors' Committee, at its meeting of 6 June 1969, was called upon to vote in favour of a proposal by the Liquidator, Att'y Giuseppe Siracusa, regarding, *inter alia*, a request presented to the Court by Eltel for the purchase of the facility and the raw materials/supplies of ELSI for the amount of L.4.0 billion; for holding a fourth auction on 12 July 1969 for the sale of the said facility and materials at the base price of L.4 billion including L.3.2 billion for the factory and equipment and L.800 million for raw materials and semifinished goods excluding those intended for the manufacture of semiconductors and also excluding finished products;

Whereas, at the said meeting the Creditors' Committee voted as follows: Two members in favour, the Chairman abstained, the undersigned (in the capacity indicated) against;

Whereas, on request by the liquidator, the Court decided, per court order dated 7 June 1969, to proceed with the sale by public auction scheduled for 12 July 1969, of the ELSI facility, equipment and materials (raw and semifinished) at the price and under the conditions indicated above;

Now Therefore, Raytheon Europe International Company, in its name and for its own account as a creditor as well as in the interest of all other creditors of ELSI, hereby submits its

Appeal

against the Court Order of 7 June 1969 in the bankruptcy case of Raytheon-ELSI S.p.A. for the following reasons:

(1) Reference is made to the memorandum of the Appellant dated 8 April 1969 and to its appeal of 10 April 1969 both of which are to constitute an integral part of the records for the purpose of this appeal.

(2) The events following the said memorandum and appeal unfortunately bore out what had been stated in the same, namely, that *the lease actually makes it impossible to sell* the facility or any individual production line *to any third party* other than Eltel (or an associated company of the IRI group). This was manifested by the result of the last auctioning attempt of 3 May 1969 where no bidders showed up, and will become equally manifest in the auction attempt decided upon in the Court order of 7 June 1969; one can safely predict that at this auction there will be no bidder other than Eltel or an IRI company (due to the circumstances which culminated in the lease).

(3) *The lease has contributed to a lessening of the value* of the ELSI operation as is evident from the reduction of the price (relative to the raw materials) established in the Court order against which this appeal is directed.

(4) *The lease has enabled Eltel to dictate the selling price*. On 27 May 1969, after having presented an "irrevocable" offer (yet under noncommittal conditions) to acquire the plant for L.3,205,000,000, Eltel submitted to the Court a new offer (this time not only noncommittal, but not even "irrevocable") for the purchase of the facility and materials at the price of L.4,000,000,000. Disregarding the minor difference between Eltel's offer and the figure proposed by the Liquidator, the base price for the auction scheduled for 12 July 1969 corresponds essentially to that named by Eltel.

(5) For the reasons indicated in the above-mentioned memorandum and appeal, *the lease had and still has the only purpose for Eltel to put the same in a favourable position in connection with the acquisition of the ELSI operation, with considerable prejudice to the creditors.*

(6) *The sale* ordered by the ruling against which this appeal is directed, *in terms of the timing and conditions, is not in the interest of the creditors* because: *(a)* the price is reduced to a point where the creditors' chances of realizing the amounts hoped for are nil; *(b)* the time interval since the preceding auction attempt is too short (it should be noted that four auction attempts were scheduled within a period of less than six months); *(c)* no adequate attempts were made to sell the facility by individual production lines, and the possibility of selling these lines individually has not been publicized at all. In fact, it even appears that a very

large German company which had expressed an interest in the acquisition of the highly valuable microwave production line with an inventory valued at about L.1.500.000.000. was discouraged by government circles, according to suppositions made at the Creditors' Committee meeting of 6 June and noted by the Appellant on that occasion; *(d)* ordering the sale at a price below that established for the preceding auction manifestly contradicts the justification given for the lease of the facility to Eltel, namely, that the lease would make it possible to sell the facility at higher prices due to its greater operational efficiency.

(7) *Eltel's offer of 27 May 1969 does not* juridically *commit* that company in any way, leaving Eltel the option of whether or not to make a bid in the auction or to give any one justification for a no-bid position (for example, the small difference between Eltel's offer and the figure proposed by the Liquidator for the raw materials).

However, Eltel's offer which was disclosed by the press, will have the effect, within the framework of a number of governmental measures which have caused ELSI's insolvency and subsequent bankruptcy and the situation now prevailing, *of discouraging any private entrepreneur from making a bid in the auction* for the acquisition of the ELSI operation once further publicity has been given to the willingness of political authorities to take over ELSI's plant and business which *in the eyes of a private businessman constitute in essence a confiscation.*

(8) *The only and immediate effect of the lease*, within just a few weeks, *has been a reduction* of the price of the ELSI facility with the said materials, with the danger of serious losses to even the preferred creditors (except for the ELSI employees whose claims are guaranteed by the Sicilian Regional Administration) if, should Eltel not honour its obligation (albeit juridically noncommital) to make a bid at the auction on 12 July 1969, the price is dropped further.

For All These Reasons

and for the reasons outlined by the Appellant in its memorandum of 8 April 1969 and its appeal to the Court dated 10 April 1969, Raytheon Europe International Company requests that the Court immediately revoke the ruling against which this appeal is directed, so as to prevent and avert the most serious, irreparable prejudice it would otherwise entail for the creditors.

Palermo, 7 June 1969

(Signed) Giuseppe BISCONTI,
Att'y Giuseppe BISCONTI n.q.
(Signed) (illegible)
Att'y Francesco CALAMIA.

THE COURT OF PALERMO

Third Section, Civil and Bankruptcy, meeting in the Chambers of the Council and consisting of the following gentlemen:

Dr. Livio Fivrani (?)	President
Dr. Salvatore Burgio (?)	Judge
Dr. Vincenzo Badalamenti	Judge in above case.

Having read the above Appeal;

Having seen the record of the proceedings in the bankruptcy case of Raytheon ELSI S.p.A.;

Considering that the first five points of the appeal relate to the advisability of leasing the facility in respect of the possibility of a judicial sale of the same;

Considering that this Court has already decided this issue in its ruling of 9 May 1969, filed in the Clerk's Office on 19 May 1969;

Considering that the remaining points relate to the timing, conditions and modalities of the sale;

Considering that in this respect the Judge in charge of this bankruptcy case has made good use of his discretional powers,

1. By responding to the need for an expeditious disposition of the operation;
2. By making a small reduction (about 6 per cent) in the price of the raw materials only which is irrelevant with respect to the price established for the last auction sale that saw no bidders;
3. By offering for sale the plant with its appurtenances;

Therefore, deeming the appeal unfounded and unacceptable,

For All These Reasons

The Court rejects the above Appeal.

Palermo, 20 June 1969.

The Presiding Judge,
(Signature)

Filed on 23 June 1969.

The Clerk,
(Signature).

III-39. Assignment of Assets to ELTEL

[Italian text and English translation not reproduced; for another English translation see I, *Memorial of the United States, Annex 74]*

III-40. Raytheon Agreement to Grant Licence

[See I, *Memorial of the United States, Annex 73]*

Unnumbered Documents, Volume III

III-41. APPRAISAL[1] BY COURT-APPOINTED EXPERT

[Italian text not reproduced]

APPRAISAL FOR DETERMINING THE VALUE OF FACTORY, EQUIPMENT, TOOLS, ETC., OF THE ELECTRONICS FIRM RAYTHEON-ELSI S.P.A.

To the Hon. Judge Dr. Vincenzo Badalamenti, Section 3a Bankruptcy, Civil
Court of Palermo

Introduction

On 16 September 1968, Counsellor Giuseppe Siracusa, liquidator/receiver in the bankruptcy case of Raytheon-ELSI S.p.A., asked the Judge, the Hon. Dr. Spina of the Court of Palermo, that one or several technical consultants be appointed for determining the value of the plant, equipment and other assets of the electronics firm known as Raytheon-ELSI S.p.A. of Via Villagrazia 79, Palermo, and thus the base price for an auction.

On 19 September 1968, at the recommendation of Attorney Siracusa, the Hon. Judge Dr. Spina appointed the undersigned Prof. Ing. Mario Puglisi, Full Professor of the Department of Radio Technology at the Faculty of Engineering of the University of Palermo, as the technical consultant who was to proceed with the appraisal of the above-mentioned company; he decided that the technical Consultant is to be sworn in at the time the appraisal report is submitted. The undersigned, accepting the appointment and having read the text of the request by the liquidator Attorney Siracusa which stresses the urgency of the appraisal not only for the reasons typical of bankruptcy situations involving industrial corporations, but most of all in view of the high obsolescence rate of the material involved, immediately initiated the appraisal. In the course of this survey, the technical Consultant availed himself of his fiducial co-workers as expressly permitted by the liquidator, verbally and in writing, in order to complete the appraisal at the earliest possible date. Especially for on-site inspections and for individual valuations, the Consultant had the co-operation of Ing. Stefano Riva Sanseverino, professor of nuclear electronics at the University of Palermo.

The appraisal was begun by the undersigned on 20 September 1968, at 10 a.m., on the premises of the electronics firm Raytheon-ELSI S.p.A. at Via di Villagrazia 79, Palermo, and continued every following day, mornings and afternoons, through 29 September 1968, in an effort to obtain and objectively ascertain all the data needed for the completion of the task with which the Court had entrusted the undersigned. The survey progressively produced the data which have been compiled into the report here submitted. For a more organic structuring of the appraisal, this report is broken down into the following chapters:

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[1] Extracts.

1. Outline of the electronics firm Raytheon-ELSI S.p.A.[1]
2. Valuation criteria and appraisal methods.
3. Detailed appraisal of Raytheon-ELSI S.p.A.[1]
4. Summary.
5. Conclusion.

[. . .]

FOURTH CHAPTER

General Summary

This chapter gives a recapitulation and summary of the sectional appraisals shown in detail in the preceding chapter, for establishing the overall valuation of the Raytheon-ELSI S.p.A. electronics company.

(A) Land:	
1. Level ground	L.447,478,500
2. Strongly sloping terrain	1,000,000
3. Improvements for roadways, courtyards, etc.	44,660,000
4. Improvements for parking lots	10,800,000
Total land valuation:	L.503,938,500
(B) Buildings:	
1. Appraisal of buildings	L.1,278,040,000
2. Minus cost of renovation	65,000,000
Total valuation of buildings:	L.1,213,040,000
(C) Equipment and Machinery:	
1. "MEC" Section	L.149,250,000
2. "LAC" Section	29,500,000
3. "COMPLEX" Section	26,280,000
4. "OST" Section	26,850,000
5. "DCQ" Section	31,400,000
6. "MET" Section	344,280,000
7. "MET-TOOLS" Section	60,350,000
8. "SCA" Section	12,950,000
9. "LAMPS" Section	26,310,000
10. "RAX" Section	86,310,000
11. "TRC" (CRT) Section	608,133,940
12. "COMBINED INVENTORY" Section	161,390,000
13. "SIM" Section	523,586,000
14. "SCD" Section	356,640,000
15. "SIM DISTRIBUTION, SUPPLIES, ACCESSORIES" Section	287,450,000
16. "MISCELLANEOUS" Section	39,750,000
17. "X" Section	12,000,000
Total equipment appraisal:	L.2,782,459,940
(D) Capital Equipment:	L.61,150,000

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[1] For the purpose of the following report, the designation electronics firm Raytheon-ELSI S.p.A. or, in short, ELSI, always relates to the entire complex comprising land, buildings, plant equipment, machines, tools and furnishings which are the direct object of this appraisal.

FIFTH CHAPTER

Conclusions

From the group totals shown in the preceding chapter for the categories "Land" "Buildings", "Equipment and Machinery", and "Capital Equipment", we derive the value of the Raytheon-ELSI S.p.A. electronics company as follows:

1. Land	L. 503,938,500
2. Buildings	L. 1,213,040,000
3. Equipment and Machinery	L. 2,782,459,940
4. Appurtenances and Furnishings (capital equipment)	L. 61,150,000
	L. 4,560,588,440

The undersigned Technical Consultant thus considers completed the assignment given him by the Court, declaring that the value of the electronics company Raytheon-ELSI S.p.A. is four billion five hundred and sixty million five hundred and eighty-eight thousand four hundred and forty Lire.

Palermo, 11 October 1968.

The Technical Consultant
(Prof. Dr. Ing. Mario PUGLISI)
(Signature)

IV-1. COMPLAINT OF CREDITO ITALIANO

[Italian text and English translation not reproduced]

IV-2. COMPLAINT OF BANCO DI ROMA

[Italian text and English translation not reproduced]

IV-3. COMPLAINT OF BANCO COMMERCIALE ITALIANA

[Italian text and English translation not reproduced]

IV-4. COMPLAINT OF BANCO DI SICILIA

[Italian text and English translation not reproduced]

IV-5. COMPLAINT OF CASSA DI RISPARMIO

[Italian text and English translation not reproduced]

IV-6. DECISION IN FIMIR CASE

[Italian text and English translation not reproduced]

IV-7. RAYTHEON BRIEF TO SUPREME COURT

[Italian text and English translation not reproduced]

V-1. CURATOR'S REPORT OF 28 OCTOBER 1968

[Italian text and English translation not reproduced]

V-2. ELSI PLANT BROCHURE

[Not reproduced]

V-2A. CURATOR'S ACCOUNTS IN BANKRUPTCY

[Italian text not reproduced]

BANKRUPTCY CASE OF RAYTHEON EL.SI. S.P.A. PLAN FOR PARTIAL DISTRIBUTION

Claims verified and approved as at 13 November 1969.

Preferred Claims:

Tax collector (state property tax and miscellaneous other tax liabilities	L.255,165,432
Public Registry Office (registration/stamp fee)	L.22,010,000
IRFIS (principal and interest as of 12 July 1969)	L.2,638,347,390
Bank of Sicily (principal and interest as of 12 July 1969)	L.855,066,945
Money due the workers	L.987,868,398
I.N.P.S. (social security)	L.319,058,192
I.N.P.D.A.I. (health insurance premiums)	L.51,238,552
I.N.A.M. (employee insurance)	L.153,953,734
I.N.A.I.L. (workmen's compensation)	L.5,834,945
E.A.S.D.A.I. (management employee insurance)	L.6,680,762
Other preferred claims including turnover tax, customs duties, etc.	L.55,351,500
Total	L.5,350,168,686
Total, ordinary claims:	L.10,221,329,847
Cost of proceedings and administrative expenses as of 31 Oct. '69	L.237,689,207
Storage charges claimed by General Warehousing Consortium	L.421,935
Total	L.238,111,142

Receipts from sale of fixed assets —

From sale of plant and equipment, including the amount charged the buyer on release from receivership	L.3,205,000,000
From lease of the facility	L.47,916,666
Total receipts	L.3,252,916,666
Minus set-aside per Article 113, L.F.	L.300,000,000
Distributable balance:	L.2,952,916,666
(a) Proportional cost of proceedings and administrative expenses	L.165,982,146
Balance	L.2,786,934,550
(*b*-204/*c*) Local tax (property tax and late charges on arrears)	L.90,780
	L.2,786,843,770
(*c*-1/*c*) Public Registry Office (registration/stamp fee)	L.22,010,000

Note: This amount was allowed under ambiguous circumstances not yet cleared up, and will be withheld or deposited according to a forthcoming decision by the Court.

Balance	L.2,764,833,770
(*d*-130/*c*) I.R.F.I.S. (first mortgage) already paid by subscription on ELTEL's part to a mortgage loan with IRFIS dated 6 August 1969, by Bianca Barbera	L.2,180,000,000
Balance	L.584,833,770
(*e*-130/*c*) I.R.F.I.S. (first mortgage), amount of principal and interest as of 12 July 1969	L.458,347,390
Balance	L.126,486,380
(*f*-221/*c*) Bank of Sicily (second mortgage), applied on account:	L.126,486,380
	000—

Note: The Bank's remaining claim will be satisfied out of the sale of chattel to the extent provided for in Article 2778/3 C.C. and under the terms of Article 5 of law No. 135 of 16 April 1954, with priority rights on the raw materials on hand.

Receipts from the Sale of Chattel —

From the sale of raw materials	L.801,000,000
From the sale of finished goods and collection of receivables	L.1,107,227,578
Total receipts	L.1,908,222,578
Minus set-asides per Article 113 L.F.	L.625,000,000
Distributable balance	L.1,273,222,578
(*a*) Proportional cost of proceedings and administrative expenses per Article 111 L.F.	L.72,129,026
Balance	L.1,201,093,552
(*b*) Claims by secondary lenders (preferred claims per Article (*illegible*), paragraphs 1 and 2, law No. 153 of (*illeg.*) minus deductions by way of (*illeg.*) in favour of Compagnia Tirrena di Capitalizzazione ed Assicurazione (CTCA) and minus legally approved distraints by third parties (see attached list)	L.984,878,095
Balance	L.216,215,457
(*c*-T.3) CTCA (preferred employee claims)	L.183,000
Balance	L.216,032,457
(*d*) CTCA (above) (claims . . . (*illeg.*) with deductions for employees (see attached list))	L.2,321,000
Balance	L.213,711,457
(*e*) Randazzo Angelo S.p.A. (claim allowed per order of the Palermo Magistrate on 1 April 1969, . . . (*illeg.*) distrained by employee Viola Stefano), on the condition that the Court recognize the amount and dispense with the payment	L.226,440
Balance	L.213,485,017
(*f*) Liquidator/receiver of bankrupt Raytheon-EL.SI., preferred claim allowed by order of the Palermo Ma-	

gistrate of 1 April 1969 . . . *(illeg.)* to the employee Viola Stefano (under same conditions as above)	L.15,000
Balance	L.213,470,017
(g) Niela Colombo, Oldani (T.9), preferred employee claim for the amount allowed by the Magistrate	L.244,863
Balance	L.213,225,154
(h) I.N.P.S. Palermo, preferred claim on paid-up IVS share (t.17) per Article 66, second paragraph, of law No. 153 of 30 April 1969, under exclusion of any other amounts not constituting IVS shares which, per the aforesaid law, have the priority thereby established . . . *(illeg.)*	L.135,175,921
Balance	L.78,049,233
(i) . . . DAI *(illeg.)* (applications No. 180 and 209), preferred claim as under *(h)* above	L.24,793,263
Balance	L.53,255,968
(l) Bank of Sicily, Industrial Credit Department, on account:	L.53,255,968
Special priority on raw materials and finished products per Article 5 of law No. 135 of 16 April 1969.	—00—

Palermo, 18 November 1969.

The Liquidator
(Att'y Giuseppe SIRACUSA).

V-3. SCHEDULE OF PAYMENTS BY RAYTHEON ON GUARANTEED LOANS

SCHEDULE OF BANK GUARANTEES
PAID BY RAYTHEON

Banca Nazionale del Lavoro	Lire 2,272,770,410	($3,636,432.70)
Banca Commerciale Italiana	2,359,955,496	(3,775,928.80)
Banco di Roma	242,594,802	(388,151.70)
Banco di Sicilia	754,160,959	(1,206,657.50)
	Lire 5,629,481,667	($9,007,170.70)

Equals at an exchange rate of $1.6 = Lire 1,000.

V-4. RAYTHEON'S OPEN ACCOUNT CLAIM OF LIRE 550,000,000

RAYTHEON COMPANY
ACCOUNT RECEIVABLE DUE FROM RAYTHEON-ELSI

Invoice No.	*Transaction*	*Amount*	*Balance*
CC65217	Corporate Special Purchases	$10,576.22	
CC65218	Western Electricity Royalty	59,045.18	
CC65229	Interest on Guaranteed Bank Loan	42,833.71	
CC65230	Nato-Hawk Components	28,650.66	
CC65234	Trade Accounts	566,999.82	
CC65235	Commissions	(5,753.78)	
CC65236	Royalty Account	440,613.71	
CC65237	Management Fee	91,351.62	
CC65246	Accounts Receivable Other	6,656.23	$1,240,973.37
	Industrial Tubes and Other Items Sold to SELIT (Societa Electroniche Italiano)		37,685.12
			$1,278,658.49

CERTIFICATES OF AUTHENTICITY

[Not reproduced]

REPLY OF THE UNITED STATES OF AMERICA

RÉPLIQUE DES ÉTATS-UNIS D'AMÉRIQUE

PART I. INTRODUCTION

This Reply addresses the numerous unsubstantiated, irrelevant, or incorrect assertions made by the Respondent in its Counter-Memorial, filed 16 November 1987. The Respondent both illegally requisitioned Elettronica-Sicula, S.p.A. ("ELSI"), frustrating Raytheon's and Machlett's planned orderly liquidation of ELSI, and interfered in the subsequent bankruptcy proceedings. Yet the Respondent denies that its acts violated various provisions of the Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic ("the Treaty"), which entered into force in 1949, and its Supplement, which entered into force in 1961. This Reply is filed in accordance with the Court's Order of 17 November 1987.

From 1956 to 1967, Raytheon and Machlett invested substantial amounts of capital and other assistance in their Italian electronics subsidiary, ELSI, with the expectation that ELSI would become self-sufficient in the Italian market. Despite its reputation for quality products and its sizeable volume of sales, ELSI never became a self-sufficient, let alone profitable, enterprise. Contrary to Italy's assertions, Raytheon and Machlett did nothing to create ELSI's financial problems.

In early 1967, Raytheon and Machlett initiated a comprehensive effort to determine the reasons for ELSI's financial difficulties. They determined that ELSI could survive in the Italian market only with a substantial improvement in its competitive environment: specifically, by partnership with an Italian corporation or substantial co-operation by the Italian Government. In early 1967, Raytheon and Machlett decided that unless they could secure a plan to improve ELSI's competitive environment, they would proceed with an orderly liquidation of ELSI's assets within a year. This decision was communicated to the Respondent.

Although the Respondent made broad proposals for ELSI's continued operation, these proposals required that Raytheon and Machlett make substantial additional investments in ELSI with no prospect of recovering that investment, while continuing to cover ELSI's losses. Raytheon and Machlett reluctantly decided in March of 1968 to proceed with the orderly liquidation as planned. Under that plan, Raytheon and Machlett would advance all funds necessary to allow ELSI to be sold as a going concern.

Instead of allowing Raytheon and Machlett to liquidate ELSI in an orderly fashion, the Respondent, in violation of Italian law, requisitioned ELSI's plant and assets on 1 April 1968 allegedly because the orderly liquidation of ELSI would cause "social unrest". At no time, however, did the Respondent ever resume the operation of the plant or re-employ ELSI's workforce. This unjustified and illegal requisition prevented Raytheon and Machlett from selling ELSI's assets and thus proceeding with the orderly liquidation as planned. Although Raytheon and Machlett immediately took all possible steps to have the requisition rescinded, the Respondent refused to quash the order and indeed told Raytheon that it would continue indefinitely. Since ELSI was deprived of the revenue with which to meet continuing financial obligations, Raytheon and Machlett directed ELSI to file a petition in bankruptcy on 26 April 1968 in accordance with Italian law.

Following the filing of ELSI's petition in bankruptcy, the Respondent continued to exploit the situation in which the requisition had placed ELSI's assets, eventually acquiring ELSI for itself. Only after ELSI had been purchased by the Respondent, the Respondent's administrative and judicial organs ruled that the

Respondent's requisition of ELSI was unlawful as a matter of Italian law. Unfortunately, the Respondent was required by its courts to pay only a small fraction of the compensation it should have paid to remedy the damage the Respondent caused. Accordingly, Raytheon and Machlett incurred substantial losses as a direct result of the Respondent's actions.

These actions of the Respondent violated several provisions of the Treaty. The Treaty violations in this case are clear from the ordinary meaning of the articles cited by the United States. The Respondent's broad assertions about the application of the Treaty and what interests it protects are unfounded; the Treaty provisions cited by the United States protect United States shareholders of companies incorporated in Italy. The requisition and other conduct by the Respondent were both arbitrary and discriminatory, prevented Raytheon and Machlett from managing and controlling an Italian corporation whose shares they had lawfully acquired, and resulted in the impairment of their legally acquired rights and interests — in violation of Articles III and VII of the Treaty and Article I of the Supplement. In addition, the requisition constituted a taking of Raytheon's and Machlett's interests in property without due process and without adequate compensation, in violation of Article V of the Treaty. The Respondent also failed to comply with the obligation under Article V to afford protection and security, by the unwarranted delay in ruling on the challenge to the requisition order and by failing to afford protection to ELSI's plant and premises. These violations, singly and in combination, entitle the United States to receive full compensation for the damages suffered by Raytheon and Machlett.

Italy does not contest the jurisdiction of this Court. Italy does assert that the claims of the United States are inadmissible because local remedies, in the form of a suit in Italian courts based on the Treaty, were not exhausted. The principle that local remedies be exhausted was followed in this case. All reasonable steps were taken to obtain compensation from the Respondent for the unlawful requisition of ELSI. Further resort to Italian courts on the basis of the Treaty is unavailable or unreasonable. In any event, the Respondent is estopped from insisting on such action at this time. Consequently these claims are properly before the Court.

PART II. STATEMENT OF FACTS

CHAPTER I

THE DECISION TO LIQUIDATE ELSI

Section 1. ELSI Received Extensive Financial and Managerial Assistance from Raytheon and Machlett but Could not Become Economically Self-sufficient

By 1967 ELSI had become a respected manufacturer of sophisticated electronic components and equipment with a modern, fully equipped plant in Palermo, a reputation for quality products, and a significant volume of sales and export earnings[1]. It had been Raytheon's and Machlett's expectation from the outset that ELSI would gain access to Italian markets, develop new products, and continue to become more efficient in its operations. ELSI, however, was never able to achieve the financial self-sufficiency that Raytheon and Machlett had anticipated[2].

John Clare, chairman of the Board of Directors of ELSI, and other qualified technical experts under his supervision, prepared an in-depth study of ELSI's potential for survival in the Italian market[3]. They determined that ELSI could operate effectively in Italy only with the addition of an Italian partner, infusion of capital, introduction of new products, and greater access to Italian Markets[4]. These conclusions, previously communicated to the Respondent, were summarized in a report which was distributed to senior officials of the Italian Government, the Sicilian Government, IRI[5], Italian banks, and other members of the Italian establishment[6].

The Counter-Memorial presents additional factors that allegedly contributed to ELSI's inability to become financially self-sufficient, including ELSI's geographic location, the quality and prices of ELSI's products, and the obsolescence of some of ELSI's production lines[7]. The Respondent itself engaged in sustained efforts to attract commerce to the Mezzogiorno region by publicized incentives[8];

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[1] For a discussion of ELSI's product lines and markets, *see* Memorial, **I**, p. 47.

[2] For a discussion of ELSI's financial performance, *see* Memorial, **I**, p. 47; Affidavit of Arthur Schene, Former Vice President-Controller of Raytheon Company, 17 Apr. 1987 (Ann. 13).

[3] In 1967 Raytheon and Machlett designated John Clare, Raytheon Vice President and General Manager of its European management subsidiary, Raytheon Europe International Company, to be ELSI's chairman. They also appointed several other highly qualified persons to assist ELSI. Memorial, **I**, p. 48.

[4] Memorial, **I**, pp. 48-49; Affidavit of John D. Clare, Former Chairman, Raytheon Europe International Company, 10 Jan. 1987, para. 18 (Ann. 15).

[5] Istituto per la Ricostruzione Industriale ("IRI") is a holding company owned and controlled by the Respondent. It has extensive and wide-ranging commercial and banking interests dominating, among other things, the telecommunications, electronics, and engineering markets. Memorial, **I**, p. 49. IRI's actions are thus attributable to the Respondent. Memorial, **I**, p. 85.

[6] Memorial, Ann. 15, para. 20; Memorial, "Project for the Financing and Reorganisation of the Company", 1967 Report prepared by Raytheon-ELSI, S.p.A. (Ann. 22).

[7] Counter-Memorial, *supra*, pp. 4-5.

[8] Memorial, **I**, p. 43.

thus it is ironic that Respondent now attempts to question Raytheon's and Machlett's decision to invest in the region. Despite numerous inquiries to, and promises of, appropriate Italian authorities, these benefits never materialized[1]. Receipt of these benefits would have improved ELSI's financial condition and enhanced its attractiveness to prospective buyers.

Further, ELSI had developed a reputation for the manufacture of high quality and highly sophisticated electronics[2]. In preparation for the introduction of color television in Europe, ELSI had constructed a modern, up-to-date facility for color television research and development pending the decision by Italy and other European countries as to the type of television system they would adopt[3]. In addition, by 1967 ELSI had already moved from production of germanium transistors, which had become technologically obsolete, to the production of silicon rectifiers[4].

Of course, the reasons for ELSI's financial problems are not relevant to the dispute before this Court and were merely presented as background information in the United States Memorial. Whatever the reasons for ELSI's inability to become a profitable enterprise, Raytheon and Machlett were still entitled to put ELSI through an orderly liquidation under their own control. The critical question is whether the Respondent wrongfully requisitioned the plant, prevented its orderly liquidation, permitted the plant to be occupied, and subsequently manipulated the bankruptcy process to its own advantage.

Section 2. Raytheon's and Machlett's Good Faith Efforts to Negotiate a Solution to ELSI's Problems Were Frustrated by the Respondent

Beginning in early 1967 Raytheon made it clear to the Respondent that ELSI could not operate effectively in Italy and that Raytheon would not make additional capital contributions to keep ELSI operating without greater co-operation by the Respondent. In approximately 70 meetings with cabinet level officials of the national and Sicilian Governments, John Clare and other Raytheon officials presented numerous specific proposals for Government partnership in ELSI and Government support for ELSI's development of new products and markets[5].

Raytheon proposed that ELSI find an Italian partner. IRI, for example, dominated the Italian electronics industry at this time and controlled important segments of it, such as the manufacture of telephone components[6]. At first, the Respondent made encouraging statements, but the Respondent was unwilling in the end to agree to a concrete, viable solution to ELSI's problems[1]. Under the Respondent's proposals, Raytheon and Machlett would continue to bear the operating losses of ELSI without itself committing to take specific actions to improve ELSI's ability to compete. Raytheon, however, could not agree to incur continuing losses or to defer any longer its plan for the orderly liquidation of ELSI.

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[1] The Respondent's argument that ELSI's distance from its suppliers of glass tubes in northern Italy is relevant, if at all, only to one of ELSI's product lines, cathode ray tubes. Of course, the transportation subsidy would have removed any disadvantage in this regard, had the Respondent put this program into effect as it had promised. Memorial, I, pp. 48-49, 52. The Respondent's argument with respect to semiconductors is also misplaced as transportation costs of these items is negligible relative to total cost.

[2] Memorial, I, p. 47.

[3] Respondent's suggestion that ELSI's products lacked reliable markets is also misplaced. Counter-Memorial, *supra*, p. 4. ELSI was poised to enter the market for color television. Furthermore, ELSI's sales to Nato, while irregular by nature, were hardly "dwindling to nothing". *See* Memorial, Ann. 22, App. B4. Nonetheless, ELSI recognized that military sales could not form an exclusive operating basis and for that reason sought to develop new products and markets. Memorial, Ann. 22, I, pp. 205-206.

[4] Memorial, Ann. 22, I, p. 208.

[5] Memorial, I, p. 49.

[6] Memorial, I, pp. 49-50; Affidavit of Charles F. Adams, Finance Committee Chairman and Director of Raytheon Company, 17 Apr. 1987, para. 30 (Ann. 9); *see* Ann. 15, para. 31.

Section 3. As Is Permitted Under Italian Law, Raytheon and Machlett Decided to Place ELSI through an Orderly Liquidation Rather than through Bankruptcy Proceedings

Under Italian law, shareholders are entitled to liquidate a company's assets voluntarily, by their own resolution[2]. Therefore on 28 March 1968, having decided that the orderly liquidation of ELSI's assets was prudent in view of ELSI's financial situation, Raytheon and Machlett voted in accordance with Italian law to proceed with the plan for orderly liquidation prepared by ELSI's management.

ELSI's management made preparations to sell ELSI as a going concern, with an established name and reputation, customer and supplier relationships, and the necessary patent and trademark licenses. ELSI would maintain a limited operation to complete work-in-process, and ELSI's management took all possible steps to maintain good relationships with ELSI's customers and suppliers. Raytheon and Machlett planned to offer ELSI's six product lines either as a total package or individually to maximize the realizable price[3], and made it known that they were willing to enter into technical assistance agreements with the ultimate purchasers of ELSI.

Raytheon also made the commitment to advance any funds to provide the necessary liquidity for the orderly liquidation. Raytheon established a $1.25 million line of credit to cover payment of the small creditors, and ELSI began making payments to them in March of 1968[4]. In addition, Raytheon was willing to pay all creditors whose claims were not satisfied by the sale of ELSI's assets[5].

It was clear to Raytheon and Machlett that an orderly liquidation would generate far greater revenue from the sale of ELSI's assets than would a bankruptcy process. In the first place, Raytheon would have used its knowledge of the electronics industry to locate buyers on a worldwide basis and to negotiate the terms for the sale of ELSI's six product lines, maximizing the return for both creditors and shareholders. Further, Raytheon and Machlett would have realized the substantial value of ELSI's intangible assets, including the technical assistance agreements that could be negotiated with each purchaser. Finally, with Raytheon and Machlett in control of ELSI's liquidation, Raytheon could ensure that the plant, equipment, and inventory would be well-maintained and protected.

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[1] Respondent initially made encouraging statements that IRI would agree to participation in ELSI. *See*, e.g., Minutes of Meeting with Hon. Vincenzo Carollo, President of the Sicilian Region (20 Feb. 1968) (the alleged discrepancies in the minutes to this meeting are refuted in the letter from Timothy E. Ramish, Deputy-Agent of the United States, to the Registrar of the Court, dated 13 Jan. 1988). Respondent's encouragement never materialized in a specific or written proposal for ELSI's future operations. *See*, e.g., Memorial, Ann. 15, Exhibit G, I, p. 181.

[2] Article 2448, n. 5, of the Italian Civil Code provides that a joint stock company may be dissolved by resolution of the shareholders at a meeting called by the directors. M. Beltramo, G. Longo, and J. Merryman (trans.), *The Italian Civil Code* (1969), p. 611. *See also Statement by Professor Franco Bonelli*, 2 Mar. 1988 (Ann. 1 to this Reply).

[3] Each product line could be sold as a separate package, including the respective technology, contracts, customer and supplier bases, and established name and reputation to buyers elsewhere in Italy, Europe or Japan. *See* Affidavit of Joseph A. Scopelliti, Memorial, para. 12 (Ann. 17).

[4] Memorial, Ann. 15, para. 53.

[5] *Ibid.*, Ann. 13, para. 18. Although the Respondent fails to so distinguish, Counter-Memorial, *supra*, p. 10, Raytheon's and Machlett's commitment to fund the orderly liquidation in order to maximize the return on its investment must be distinguished from Raytheon's and Machlett's refusal to continue to capitalize ELSI with no prospect of a return on their investment.

A trustee in bankruptcy, by contrast, lacked the commercial and technical expertise and the financial incentive to market ELSI or its product lines effectively on a worldwide basis to appropriate buyers[1]. Further, the bankruptcy process did not afford a vehicle for the marketing and sale of the intangible value of ELSI as a going concern, including the premium that would be placed on Raytheon's willingness to enter technical assistance and license agreements with the ultimate purchasers. Moreover, Raytheon and Machlett recognized that the bankruptcy process would not result in the sale of ELSI's assets quickly. Deterioration in the assets caused by delay in the sale would, of course, diminish the return to ELSI's creditors and shareholders. Finally, Raytheon and Machlett sought to avoid the substantial administrative costs associated with the bankruptcy process, costs which would not have been incurred under the orderly liquidation.

Sale of ELSI's assets on a going concern basis[2] would have been sufficient to pay all of ELSI's liabilities in full, including amounts owed to Raytheon, and return 391 million lire to Raytheon and Machlett as a small return on their large investments they had made in ELSI[3]. Of course, Raytheon had good reason to believe that the bank creditors would settle their unsecured, unguaranteed claims at no more than 50 per cent[4].

Section 4. At no Time Prior to 1 April 1968 Was It Required by Italian Law that ELSI Be Placed in Bankruptcy

Prior to the requisition, ELSI was never in jeopardy of bankruptcy or compulsory dissolution. Italian law would have required ELSI to file a petition in bankruptcy if it was impossible for ELSI to fulfill regularly its financial obligations[5]. Alternatively, ELSI could have been considered dissolved as a matter of Italian law only if its capital were depleted below a statutory minimum amount (at the relevant time the statutory minimum amount was one million lire)[6].

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[1] Reply, Ann. 1, para. 2.

[2] In this case, book value is the closest available approximation of going concern value. *See infra*, Part VI, Chapter III.

[3] Memorial, **I**, pp. 52, 108.

[4] *Ibid.*, **I**, p. 52. Willingness of the banks to settle their claims with ELSI at 40 to 50 per cent of their value is further evidenced by the banks' agreement to settle for 50 per cent or less of their claims in the fall of 1968. Counter-Memorial, *supra*, p. 24; *see also* Reply, Ann. 1, para. 3.

[5] Reply, Ann. 1, para. 4; Italian Bankruptcy Act, Art. 5 (Ann. 1).

[6] Article 2447 of the Italian Civil Code states:

> "If, by reason of the loss . . . [exceeding] over one-third of the capital, [the capital] falls below the minimum established by Article 2327, the directors (2380) shall without delay call the meeting (2365) to decide on the reduction of the capital and the concurrent increase thereof to an amount not less than said minimum, or on the reorganization of the company."

Italian Civil Code, op. cit., pp. 610-611; *see also*, Reply, Ann. 1, para. 5.

ELSI never contravened these laws. Until ELSI was deprived of its revenue by the requisition, ELSI consistently met and was in a position to meet all of its financial obligations[1]. ELSI's capital, even after taking into account losses, was always well above the statutory minimum[2]. Thus, contrary to the Respondent's unsubstantiated assertions, ELSI had no obligation to file a petition in bankruptcy, nor was it subject to compulsory dissolution. Raytheon and Machlett were fully entitled to proceed with the orderly liquidation of ELSI's assets under Italian law.

The Respondent also maintains that ELSI was in violation of Article 2446 of the Italian Civil Code with respect to the size of its losses and in violation of the Italian Bankruptcy Act due to its bookkeeping practices. These assertions, like many of those found in the Counter-Memorial, are irrelevant to the claims before this Court. In the interest of accuracy, however, it must be noted that ELSI was fully in compliance with Italian law, both with regard to capitalization requirements[3] and with regard to bookkeeping practices[4].

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[1] In addition, the Respondent seems to overlook the fact that the book value of ELSI's assets was consistently greater than ELSI's liabilities. *See* Counter-Memorial, *supra*, p. 15; Memorial, Ann. 13, Schedule B1; Reply, Ann. 1, para. 5.

[2] Memorial, I, p. 53, n. 2; Reply, Ann. 1, para. 5.

[3] Article 2446 of the Italian Civil Code provides that when a company's losses exceed one-third of its capital, the shareholders — after a one-year grace period from the date they are or should be aware of such losses (typically at the time they review the balance sheets) — must either reduce the company's capital in proportion to the losses to correct the imbalance or make alternative arrangements for the disposition of the company. *Italian Civil Code, op. cit.*, p. 610. Following the review of the balance sheets for the fiscal year ending 30 September 1966, ELSI reduced the value of its stock, thereby diminishing its losses. Raytheon and Machlett invested an additional 2,500 million lire in ELSI, thereby bringing the company's capital to 4,000 million lire. Memorial, Ann. 13, Schedule B1. Notwithstanding these efforts, ELSI's losses once again exceeded one-third of its capital in the fiscal year ending 30 September 1967. This time, however, ELSI's shareholders voted within the one-year grace period, to liquidate the company rather than adjust its capital. *See* Memorial, Ann. 32. This decision was in complete compliance with Article 2446. Reply, Ann. 1, para. 6.

[4] There is also no merit to the Respondent's assertion that ELSI's books were not properly kept. Counter-Memorial, *supra*, p. 8. From the time Raytheon acquired a majority interest in ELSI, Coopers and Lybrand, an internationally respected accounting firm, audited ELSI's books. To allow time for its foreign operations to close their year-end books and to transmit their accounting data to Raytheon, Raytheon's foreign operations typically closed their books three months prior to Raytheon's consolidated report of December of each year. Under this system, Coopers and Lybrand audited ELSI's books and prepared a year-end report for the year ending 30 September 1967. The books for the period through 31 December 1967, were kept on a normal basis at Palermo and a complete management report for that period, consistent with the closing of 30 September 1967, was transmitted to Raytheon in the first quarter of 1968. The balance sheet at 31 March 1968 was prepared on a basis consistent with the valuations in the Coopers and Lybrand audit report of 30 September 1967 and a conservative extrapolation to 31 March 1968. Memorial, Ann. 13, I, p. 133. Any abnormal delay in the preparation of ELSI's books was due solely to earthquakes in Sicily and strikes at the plant in early 1968; these were brief and unavoidable interruptions in ELSI's bookkeeping operations and did not constitute violations of Italian law. Reply, Ann. 1, para. 7.

CHAPTER II

THE REQUISITION AND RESULTING BANKRUPTCY

Section 1. Rather than Allow Raytheon and Machlett to Place ELSI through a Lawful, Orderly Liquidation, the Respondent Requisitioned ELSI

By March of 1968, Raytheon's and Machlett's plan for the orderly liquidation was in place and the first steps of implementing it had begun. Raytheon and Machlett had extended the line of credit for payment of the small creditors and was engaged in discussions with the Italian banks for settlement of the large unsecured, unguaranteed debts.

One event alone prevented the orderly liquidation of ELSI's assets: the unlawful requisition by the Respondent of ELSI's plant and equipment on 1 April 1968. The requisition deprived ELSI of control of the plant and physical assets. It prevented Raytheon and Machlett from proceeding with the sale of ELSI's assets and prohibited ELSI's management from continuing as planned with limited production and sale of inventory at full value to waiting customers[1].

As discussed in Part V, below, the requisition was a deliberate act by the Respondent to prevent Raytheon and Machlett from proceeding with the orderly liquidation of ELSI's assets. The requisition was purportedly for the purpose of protecting "the economic public interest" that was threatened by the proposed liquidation[2]. However, during the requisition the Respondent never re-opened the plant, otherwise resumed production, or re-employed the plant's workers[3].

Raytheon immediately tried to get the requisition rescinded[4]. On 9 April Raytheon petitioned the Mayor to lift the requisition order, but received no response[4]. On 19 April Raytheon appealed the requisition to the Prefect of Palermo, and again received no response[4]. Determined not to foreclose any possibility of re-opening the plant, officers of Raytheon and ELSI continued to meet with Italian officials even after the requisition of ELSI. The Respondent, however, was still unwilling to come forward with any real proposals to improve ELSI's competitive position[5]. The Counter-Memorial seeks to portray the Respondent as eager to enter into a negotiated settlement by these proposals[1], but these proposals are irrelevant to the question whether the requisition and subsequent interference with the bankruptcy process violate the Treaty. In addition, the Respondent's admitted use of the requisition to coerce Raytheon and Machlett into carrying indefinitely operating losses of ELSI is precisely the type of governmental action which the Treaty condemns.

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[1] Memorial, I, pp. 52-53. Although the requisition deprived Raytheon and Machlett of management of ELSI's operations, Raytheon and Machlett directed Mr. Rico Merluzzo to remain in the plant to protect the security of the plant. Mr. Merluzzo remained in the plant until ELSI was forced to file its petition in bankruptcy. Memorial, Affidavit of Rico A. Merluzzo, Former Director of Planning, Raytheon-ELSI, S.p.A., 17 Apr. 1987 (Ann. 21).

[2] Memorial, Requisition Decree, Mayor of the Municipality of Palermo, 1 Apr. 1968 (Ann. 33); Minutes of Meeting in Palermo between Messrs. Joseph Oppenheim, Howard Hensleigh, Stanley Hillyer, and President Carollo of Sicily, 19-20 Apr. 1968 (Ann. 37); Memorandum from the President of the Sicilian Region, 20 Apr. 1968 (Ann. 38).

[3] Memorial, Ann. 21, para. 19.

[4] Memorial, I, p. 55.

[5] In April of 1968 Italy proposed to lift the requisition order following the establishment of a special management team of officials from ELSI, the Sicilian Region, and IRI to liquidate ELSI. However, this plan required Raytheon to make additional capital contributions to fund ELSI's continued operation, an option Raytheon and Machlett had determined they could no longer pursue. In the summer of 1968 the Sicilian Region also proposed a plan that would have required Raytheon and Machlett to advance all costs of ELSI's operations without any commitment on the part of the Respondent as to the exact arrangements the Respondent would make for the sale of ELSI's assets.

Although the requisition was on its face limited to six months, the President of the Sicilian Region stated to ELSI's stockholders on 19 April, and confirmed in writing on 20 April, that the requisition would continue as long as necessary to achieve the Respondent's objectives regarding ELSI[2]. With regard to Raytheon's and Machlett's ability to sell ELSI, President Carollo stated that:

> "Nobody in Italy shall purchase, that is to say IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprise shall not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed . . . In the event that the plant shall be kept closed, waiting for Italian buyers who will never materialize, the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by[3]."

Hence ELSI was deprived of income from the sale of its assets and was therefore no longer able to meet its financial obligations as they became due. Without any hope for a change in this situation by the Respondent, Raytheon and Machlett certainly could no longer advance funds to ELSI for its continued operations. ELSI therefore was required under Italian law to file a petition in bankruptcy on 26 April 1968. The bankruptcy petition explicitly and accurately stated that the reason for the bankruptcy was the requisition of the plant on 1 April 1968[4].

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[1] Counter-Memorial, *supra*, p. 22. The Respondent also speculates that the failure to reach an agreement between Raytheon and the Respondent was "an attempt [by Raytheon] to force the hand of the banks, which had previously seemed reluctant to accept a negotiated solution". Counter-Memorial, *supra*, p. 23. This unsubstantiated assertion must be rejected. Had the Respondent and IRI at any point made a concrete offer to acquire ELSI as a going concern or share ownership with Raytheon and Machlett, Raytheon and Machlett would have acceded to the plan. The failure to reach agreement was due not to the reluctance of Raytheon to reach a negotiated solution to ELSI's problem. Raytheon had worked for more than a year for just such a resolution. Failure instead was due to the Respondent's inability — or unwillingness — to commit to such a solution. *See generally* Memorial, Ann. 22. Indeed, the Respondent's unsubstantiated assertion that it "did everything it could" to help ELSI must be rejected for similar reasons. Counter-Memorial, *supra*, p. 22.

[2] *See generally*, Memorial, Anns. 37, 38. The continued negotiations with the Respondent and the fact that the appeal of the requisition was brought on 19 April — only 18 days after the requisition — did not indicate that Raytheon considered the requisition "to be little more than a temporary nuisance". Counter-Memorial, *supra*, p. 22. On the contrary until the oral and written statements by the President of the Sicilian Region, Raytheon believed that the order would soon be quashed. Although Raytheon and Machlett had been frustrated by the Respondent's refusal to engage in meaningful cooperation, until 19 April there were no indications that the Respondent would sanction the continuance of illegal actions in its treatment of ELSI.

[3] Memorial, Ann. 38.

[4] Memorial, I, p. 57.

Section 2. By Its Acts Subsequent to the Requisition, the Respondent Also Interfered with the Bankruptcy Process to Its Own Advantage

Following the filing of ELSI's petition in bankruptcy, the Respondent continued to exploit the situation in which the requisition had placed ELSI, thereby substantially aggravating the financial injury to Raytheon and Machlett. As a legal matter, the requisition prevented the Trustee once he was appointed on 16 May by the bankruptcy court from selling the plant and assets or otherwise protecting the property. Moreover, following the filing of the bankruptcy petition the Respondent allowed the local workforce to occupy the plant, which undoubtedly discouraged prospective buyers and certainly made it difficult to show to interested buyers the company's plant and other assets[1]. Even after the requisition period ended, the bankruptcy court's lease of the plant by IRI[2] had the same effect. The Respondent proceeded to obtain ELSI's work-in-process for a price below the value assigned by even the judicial valuator[3].

In addition, the Respondent repeatedly and publicly announced its intention to take over ELSI's plant through one of IRI's subsidiaries[4]. Given the extensive power and dominance of the Respondent in the commercial environment of Italy, there can be little doubt that these announcements deterred other buyers from bidding on ELSI's assets when the four auctions were held by the bankruptcy court[5]. Notwithstanding its announced intentions, however, Elettronica Telecomunicazioni, S.p.A. ("ELTEL"), the IRI subsidiary created to take over ELSI, boycotted the first three bankruptcy auctions, seeking to buy only some of the assets at a lower price. Through a series of manoeuvers which had the effect of controlling the sale of ELSI's assets, the Respondent, through ELTEL, systematically acquired ELSI's operations on a piecemeal basis, at the expense of ELSI's shareholders and creditors[6]. Taking advantage of the situation which it had created, IRI's subsidiary, Italtel, S.p.A., now uses ELSI's plant to manufacture telephone equipment — one of the new products proposed by ELSI in its 1967 Report to Italian officials[7].

On 11 August 1969, more than 16 months after the appeal was filed, but only 40 days after ELTEL had completed its acquisition of ELSI's assets, the Prefect ruled that the requisition was illegal under Italian law.

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[1] The occupation should be distinguished from the pre-requisition strikes and sporadic sit-ins, a point which the Respondent confuses. Counter-Memorial, *supra*, pp. 8, 11, 14. First, the strikes were directed at the Respondent, to persuade it to take action with respect to ELSI. Memorial, Ann. 21, para. 22. They were limited to brief interruptions of production operations and did not result in the closure of the plant for an indefinite amount of time. Only after Mr. Merluzzo left the premises following the filing of the bankruptcy petition did the workers actually occupy the plant for a sustained period.

[2] Memorial, I, pp. 60-61.

[3] *Ibid.*, p. 62.

[4] *Ibid.*, Anns. 37, 38, 46.

[5] That IRI's announcement was at the direction of the Respondent is confirmed in the Counter-Memorial, *supra*, p. 25.

[6] For a complete discussion of the bankruptcy process and ELTEL's systematic methods acquiring ELSI at a price favorable to itself, *see* Memorial, I, pp. 58-63.

[7] *Ibid.*, p. 63.

PART III. JURISDICTION

Jurisdiction in this case is based on Article 36 (1) of the Statute of the Court, as read in conjunction with Article XXVI of the 1948 Treaty of Friendship, Commerce and Navigation (the "Treaty") between the United States and Italy[1]. Although acceptance by the Respondent of the Court's jurisdiction on this basis is not necessary, the Respondent "fully recognizes" the Court's jurisdiction over this dispute as it relates to the interpretation and application of the FCN Treaty and its Supplement[2].

The Respondent declines to object to the Court's jurisdiction. Since Rule 79 of the Rules of the Court requires that any objection to the jurisdiction of the Court be made within the time-limit fixed for the delivery of the Counter-Memorial, the Respondent is now barred from raising an objection. The Counter-Memorial speculates, however, that jurisdiction with respect to Articles V (1) and (3) of the Treaty is in doubt because the United States has not put forward these provisions previously in diplomatic negotiations, in accordance with Article XXVI[3]. The Respondent's view appears based on the fact that while these provisions were discussed throughout the Memorandum of Law accompanying the 1974 Claim, they were not specifically cited in the Memorandum's "Summary of Legal Arguments".

The Respondent's view is wholly unjustified. The United States has repeatedly raised with the Respondent since 1972 the legal claims now before this Court. Each Treaty claim argued before this Court was presented to the Respondent in the Legal Memorandum submitted to the Respondent in 1974[4]. Since the Respondent has consistently refused to pay compensation for the damages suffered by the United States, the dispute has not been satisfactorily adjusted by diplomacy and is now properly before this Court pursuant to Article XXVI of the Treaty.

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[1] Memorial, **I**, p. 68.

[2] Counter-Memorial, *supra*, p. 26.

[3] Article XXVI of the Treaty states that disputes "which the High Contracting Parties shall not satisfactorily adjust by diplomacy" may be submitted to the Court.

[4] The claim presented to the Respondent in 1972 and again in 1974 appears in Volume I of the "Unnumbered Documents" annex to the Counter-Memorial. The Memorandum of Law in Support of the Claim of Raytheon Company and the Machlett Laboratories, Inc. Against the Government of Italy in Connection with Raytheon-ELSI S.p.A. appears as Volume 2 of the 1972/1974 claim. *See supra*, pp. 236, 245 (Art. III (2)); pp. 236, 246 (Art. V (1)); pp. 236, 241, 264, and 276 (Art. V (2)); pp. 245, 247 and 264 (Art. V (3)); pp. 236, 248 and 277 (Art. VII); pp. 237, 277 (Treaty Protocol, para. 2); pp. 236, 239, 264, 277 (Treaty Supplement, Art. I); pp. 237, 277 (Treaty Supplement, Art. V).

PART IV. ADMISSIBILITY OF THE CLAIMS

The Respondent contends that the United States claim is inadmissible because Raytheon and Machlett failed to exhaust available remedies in Italian courts. Raytheon and Machlett, however, have exhausted in Italy all remedies available under Italian law. Consequently the United States claim is admissible before this Court.

In the *Interhandel* case[1] this Court stated that in cases involving injury to a foreign national, the principle of exhaustion of local remedies provides that the respondent State be given the opportunity to redress the injury within its internal system. The Court explained that:

> "Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system[2]."

In this case, the Respondent was accorded every opportunity within its own legal system to pay compensation for the injury caused by its actions. Subsequent to the requisition, Raytheon and Machlett directed ELSI officials to petition formally the Mayor to lift his order. When this produced no result, Raytheon and Machlett directed ELSI officials to appeal the Mayor's order to the Prefect of Palermo. While the decision by the Prefect was pending, Raytheon and Machlett directed its representative on the creditors' committee to appeal decisions of the bankruptcy judge, such as the decisions to lease the plant to ELTEL and to sell the plant, equipment, and supplies to ELTEL. Unfortunately these appeals were denied by Italian courts[3].

Eventually the Prefect declared the requisition to be unlawful[4]. When the Mayor appealed the Prefect's decision to the Italian Council of State and the President of Italy, the appeal was dismissed and the Prefect's decision upheld[5].

Raytheon's and Machlett's interests as creditors of ELSI were represented in the bankruptcy process by the Trustee, Giuseppe Siracusa. Following the decision of the Prefect that the requisition was illegal, the Trustee brought suit against the Respondent seeking damages for the unlawful requisition. After extensive consideration of the facts and law underlying the injury to ELSI, the Court of Palermo refused to award damages[6]. Subsequently the Court of Appeals of Palermo reversed the lower court in part and found that damages were due for the six-month "use" of the plant, but not for the injury caused in preventing Raytheon and Machlett from placing ELSI through an orderly requisition[7]. The

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[1] *Interhondel* case, *Preliminary Objections, I.C.J. Reports 1959*, p. 27 ("*Interhandel* case").

[2] *Interhandel* case, p. 27; *see also Ambatielos* claim, 12 *Reports of International Arbitral Awards*, pp. 118-120 (1956) ("*Ambatielos* claim"); *Finnish Shipowners* case, 3 *Reports of International Arbitral Awards*, pp. 1503-1504 (1934).

[3] Memorial, Decree of the Civil and Criminal Tribunal of Palermo, 9 May 1969 (Ann. 64); Transcript of Bankruptcy Hearing, Civil and Criminal Court of Palermo, 13 July 1969 (Ann. 74).

[4] Memorial, **I**, p. 55.

[5] *Ibid.*, p. 64.

[6] *Ibid.*, Judgment of the Court of Palermo, Decided 2 Feb. 1973, Filed 29 Mar. 1973, Registered 4 Apr. 1973, **I**, pp. 375-376 (Ann. 80).

[7] *Ibid.*, Judgment of the Court of Appeals of Palermo, registered 24 Jan. 1974, **I**, p. 382 (Ann. 81).

Supreme Court of Appeals, after extensive consideration as to the facts and law of the case, upheld the decision of the Court of Appeals of Palermo[1].

The Respondent asserts that after all these efforts to seek redress from the Respondent, Raytheon and Machlett should also have brought suit in Italian courts based on the Treaty[2]. The Respondent, however, does not describe the statutory basis on which such a suit could be brought, undoubtedly because there is no basis for a suit under Italian law for compensation based on Respondent's violation of the Treaty. Raytheon and Machlett should not be required to pursue an unavailable local remedy prior to presentation of their claim by the United States before this Court.

Treaties only can have effect within Italy if they are incorporated into an Italian legislative act[3]. Even then, the treaty is only effective as a matter of Italian law for those provisions which are complete in their essential elements; those provisions which lack completeness remain ineffective[4]. Although the Treaty and Supplement at issue here were incorporated into Italian legislative acts[5], the provisions argued before this Court are not complete enough to permit a suit for compensation by a United States national against the Government of Italy in Italian courts[6]. Indeed, although there is provision in Article V for indemnification by the Government of Italy of those individuals or corporations who have been deprived of their property, that Article is still not sufficiently complete. For example, there is no indication whether such indemnification would be viewed as "diritto soggettivo" (subjective right), and therefore enforceable in the ordinary courts, or "interesse legittimo" (legal interest), and therefore enforceable in the administrative courts. The other articles of the Treaty pleaded by the United States are similarly not enforceable[7]. Further, since Raytheon's and Machlett's claims are those of shareholders, Italian law would prevent a suit seeking compensation based on the illegal requisition because Italian law reserves such a right to ELSI alone, despite the existence of the Treaty[8]. As stated by Elio Fazzalari, an esteemed Professor of Civil Procedure at the University of Rome, "The Respondent's claim is groundless[9]".

Professor Antonio La Pergola, then Professor of Law at the University of Bologna and subsequently President of the Italian Constitutional Court, considered in 1971 whether Raytheon could sue based on the Treaty and concluded that further local remedies were not available. Professor La Pergola stated that:

> " . . . I feel that I have to conclude that in the situation at hand all the requirements appear to be satisfied for international protection of the shareholders of the Raytheon-ELSi. S.p.A. who are United States citizens, without

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[1] Memorial, Judgment of the Supreme Court of Appeals, 26 Apr. 1975 (Ann. 82). The Supreme Court of Appeals is not capable of reviewing *de novo* the facts as found by the lower courts.

[2] Counter-Memorial, *supra*, p. 26.

[3] "Implementation of Treaties and Community Law", V *Italian Yearbook of International Law*, p. 265 (1980-1981).

[4] "Implementation of the Peace Treaty With Italy", II *Italian Yearbook of International Law*, pp. 364-365 (1976).

[5] Counter-Memorial, *supra*, p. 26.

[6] Statement by Professor Elio Fazzalari, University of Rome, 29 Feb. 1988, p. 404, *infra* (Ann. 2 to this Reply).

[7] *Ibid.*, p. 403, *infra*.

[8] *Ibid.*, pp. 403-404, *infra*.

[9] *Ibid.*, p. 403, *infra*.

> the need to pursue internal remedies prior to the possible initiation of a claim against the Italian Government[1]."

The only Italian case cited by the Respondent in support of its argument is the 1961 case of *The Durst Manufacturing Co. v. Banca Commerciale Italiana*[2]. *Durst*, however, merely holds that another provision of the Treaty — the "access to justice" clause — relieves a party who files a petition for review by the Italian Supreme Court of the need for an authentication of the signature of the Italian consul in New York by the Minister of Foreign Affairs. There were no damages awarded in that case and it did not involve the Government of Italy.

Even if the Court believes that there was some possibility that a suit by Raytheon and Machlett in Italian courts based on the Treaty would have succeeded, the principle of exhaustion of local remedies does not require an injured national to pursue a highly speculative and unlikely means of redress. The principle is satisfied if there is no effective local remedy "as a matter of reasonable possibility"[3]. Indeed, the burden is on the Respondent to prove the existence of a further remedy in Italian courts[4]. In this case, local counsel advised Raytheon that a suit based on the Treaty could not succeed[5]. Further, the Supreme Court of Appeals in Italy had already decided the amount of compensation owed by the Respondent for its unlawful actions[6]. Therefore, obtaining compensation through a suit based on the Treaty was so unlikely that it could not be considered a remedy available as a matter of reasonable possibility.

In any event, the Respondent is estopped from asserting that there exists any requirement to further exhaust local remedies[7]. Although for 15 years the Respondent entertained diplomatic representations by the United States on the basis of the Treaty (including the formal presentation of a diplomatic claim in 1974), at no time until the filing of its Counter-Memorial did the Respondent suggest or request that Raytheon and Machlett enter Italian courts and sue on the basis of the Treaty. Instead the Respondent made statements that it was willing to go to arbitration with the United States[1], which discouraged further resort to Italian courts. The United States has relied on the Respondent's representations in good faith to the United States' detriment because — assuming for the sake of argument that an action based on the Treaty could be brought — the statute of limitations on that action has now expired[2]. Therefore, the Respondent is now estopped from asserting that there should have been further resort to local remedies by Raytheon and Machlett.

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[1] Letter from Antonio La Pergola, Professor at the University of Bologna, to Raytheon Company, 9 Dec. 1971 (Ann. 3 to this Reply). Raytheon also sought the advice of its Italian counsel, Giuseppe Bisconti, who informed Raytheon on 6 Nov. 1971 that "there is no remedy under Italian law available to the shareholders of ELSI in relation to the damage suffered by them as a consequence of the requisition by the Mayor of Palermo and the subsequent events". Letter from Avv. Giuseppe Bisconti, Studio Legale Bisconti, Rome, to Raytheon Company, 6 Nov. 1971 (Ann. 4 to this Reply).

[2] 64 *Rivista di Diritto Internazionale* (1961), pp. 117-118.

[3] *Norwegian Loans* case, *I.C.J. Reports 1957*, p. 39 (separate opinion of Judge Lauterpacht); *Barcelona Traction* case, *Second Phase*, *I.C.J. Reports 1970*, pp. 144-145, and 284 (separate opinion of Judge Gros).

[4] *Ambatielos* claim, p. 119.

[5] Reply, Ann. 3.

[6] Memorial, Ann. 82. Although the opinion of the Supreme Court is not binding outside the case in which it is rendered, it is highly persuasive authority in subsequent cases in Italian courts. The *Italian Civil Code*, *op. cit.*, ix. No effective local remedy exists if further appeals to the courts are on issues previously decided by the highest court. *Panevezys v. Saldutiskis Railway*, *P.C.I.J., Series A/B, No. 76*; *X v. Austria*, 30 *International Law Reports*, p. 268.

[7] Estoppel is a general principle of international law which this Court has previously employed to qualify the rights of parties before the Court. E.g., *Arbitral Award Made by the King of Spain on 23 December 1906*, *I.C.J. Reports 1960*, p. 192, pp. 213-214 (where Nicaragua was not permitted to challenge the validity of an arbitral award in part because it had failed to raise any question with regard to the validity of the award over several years); H. Lauterpacht, *The Development of International Law by the International Court*, pp. 168-172 (1961) ("[Estoppel] may fairly be regarded as a general principle of law which, once more, is merely an affirmation of the moral duty to act in good faith"). As for the application of estoppel in the case of a bilateral treaty, a member of this Court has stated:

> "The primary foundation of [estoppel] is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith. Again I submit that such inconsistency is especially inadmissible when the dispute arises from bilateral treaty relations". *Temple of Preah Vihear* case, *I.C.J. Reports 1962*, pp. 40, 42 (separate opinion of Judge Alfaro).

For cogent discussions of the issue of estoppel, *see* Bowett, "Estoppel Before International Tribunals and Its Relation to Acquiescence", 33 *British Year Book of International Law*, p. 176 (1957); MacGibbon, "Estoppel in International Law", 7 *International and Comparative Law Quarterly*, p. 468 (1958).

[1] In response to the claim espoused by the United States in 1974 on the basis of the Treaty and customary international law, the Respondent did not protest that local remedies had not been exhausted, but instead stated that "the claim is juridically groundless, both from the international and internal point of view". Aide-Mémoire of 1978 from the Italian Ministry of Foreign Affairs to the United States. For a summary of the diplomatic efforts made to resolve this dispute, *see* I, Application Instituting Proceedings Submitted by the Government of the United States of America, Attachment 2.

[2] The normal time period for filing of a suit in Italian courts seeking compensation for damages arising from unlawful acts is five years from the date on which the act occurred. *Italian Civil Code, op. cit.*, Art. 2947.

PART V. THE CLAIMS OF THE UNITED STATES

CHAPTER I

INTRODUCTION

Respondent's Counter-Memorial attempts to obscure the violations of the Treaty by asserting inaccurate generalities about the Treaty and by attributing to the United States arguments that the United States does not make. The protections of the Treaty and the violations of it by the Respondent, however, are quite clear from the ordinary meaning of each article invoked by the United States.

The United States has shown that the Respondent, through the actions of its agents and officials, violated its legal obligations under the Treaty by: (1) unlawfully requisitioning the ELSI plant on 1 April 1968; (2) allowing ELSI workers to occupy the plant; (3) unreasonably delaying ruling on the lawfulness of the requisition for 18 months until immediately after the ELSI plant, equipment, and work-in-process had all been acquired by ELTEL; and (4) interfering with the ELSI bankruptcy proceedings, which allowed the Respondents to realize its previously expressed intention of acquiring ELSI, for a price far less than its fair market value.

All of these actions, singly and in combination, violated Articles III, V, and VII of the 1949 Treaty and Article I of its 1961 Supplement, which by its terms is an integral part of the Treaty. The protections provided under the Treaty relating to this dispute fall into four categories:

(a) protection from interference with Raytheon's and Machlett's management and control of ELSI;
(b) protection from impairment of Raytheon's and Machlett's investment rights;
(c) protection from the wrongful taking of Raytheon's and Machlett's property; and
(d) protection and security for Raytheon's and Machlett's investment.

Before addressing these four areas of protection under the Treaty, however, three general assertions by the Respondent in the Counter-Memorial must be addressed as a preliminary matter.

First, a specific object and purpose of this Treaty was to encourage investment by corporations of one Party in the territory of the other Party[1]. The United States does not argue that the *sole* purpose of the Treaty is to encourage investment[2], but certainly the articles advanced before this Court show that both

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[1] As noted in the Memorial, when the Respondent debated the merits of the Treaty, one factor that weighed in its favor was the "urgent need" of its economy for foreign capital. Memorial, **I**, p. 69.

[2] The Respondent itself agrees that the encouragement of investment was one of the aims of the Treaty. Counter-Memorial, *supra*, p. 31. Some other treaties of Friendship, Commerce, and Navigation ("FCN") entered into by the United States subsequent to this Treaty contain within their preamble a reference to the promotion of investment, but the object and purpose of all of these treaties are seen in their substantive provisions, which

Parties were concerned with the property and interests therein of each Party's corporations in the territory of the other. The 1961 Supplement, which constitutes "an integral part" of the Treaty[1], states in its preamble that the United States and Italy were "desirous of giving *added* encouragement to investments of one country in useful undertakings in the other country"[2]. The use of the word "added" shows that the original Treaty envisioned protection of investment[3]. To accept the Respondent's implied argument that the Treaty does not provide protection for United States investments in Italy would eviscerate large sections of the Treaty.

The emergence in recent years of bilateral investment treaties ("BITs") between the United States and developing countries is not relevant when interpreting this Treaty's protections for investments. BITs specifically address just investment issues rather than establish a comprehensive network governing both investments and other matters[4]. There is no reason why a later series of treaties with other countries dealing specifically with investment should weaken the provisions of this Treaty with Italy, which deals with investment and other matters.

Second, the Respondent incorrectly asserts that the only standards operating under this Treaty are a national treatment standard and a most-favored-nation standard. The ordinary meaning of the Treaty articles at issue in this dispute belies the Respondent's assertion. For instance, Article I of the Supplement establishes an unqualified rule prohibiting arbitrary and discriminatory conduct that prevents effective control and management by United States corporations of their subsidiaries in Italy or impairs their investments in those subsidiaries. Article V of the Treaty establishes an unqualified rule that property of United States corporations shall not be taken without due process of law and without just

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are largely identical and which all provide investment protections for corporations. Of course treaties create neither rights nor duties for third States. *See* 1969 Vienna Convention on the Law of Treaties, Art. 34.

[1] Treaty Supplement, Art. IX. The Vienna Convention on the Law of Treaties, Art. 31 (3), also provides that any subsequent agreement between the parties shall be taken into account when interpreting the Treaty.

[2] Treaty Supplement, Preamble (emphasis added). As stated in the ratification bill passed in Italy, "The supplemental Agreement . . . is designed above all to foster investment in Italy using private capital from the United States which is the most important, perhaps even the only, country today which has such resources at its disposal". Counter-Memorial, Ann. 9, *supra*, p. 114. (Materials from the Italian internal ratification proceedings are cited in this Reply to demonstrate that the two parties had a common understanding of the meaning and purpose of the Treaty. Standing alone, such internal ratification proceedings cannot, of course, bind another party.)

This Court has previously used the preamble of a treaty to establish its object and purpose. Case concerning *Rights of Nationals of the United States, Judgment, I.C.J. Reports 1952*, p. 24.

[3] Application of the Treaty provisions will not accentuate an "imbalance" between the Parties. Counter-Memorial, *supra*, p. 32. Even if it can be said that United States investments in Italy predominate the two Parties' economic relationship, the Respondent agreed to this Treaty not just to protect the ability of Italians to invest in the United States, but to secure for the Italian economy the benefits of United States capital in Italy. In this sense, the Italian "gain" under the Treaty predominates that of the United States. Whether one Party benefits at any given time more than the other Party is irrelevant to the agreement of each Party to abide by the provisions of the Treaty.

[4] The United States has negotiated BITs with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada. None of these treaties is yet in force. The BITs draw on concepts of protection which were developed in the FCN treaties subsequent to World War II. Any greater specificity of investment protections in the BITs are attributable to innovations that address concerns particular to investments in developing countries. P. Gann, "The U.S. Bilateral Investment Treaty Program", 21 *Stanford Journal of International Law*, pp. 373-374 (1985).

compensation. Article III of the Treaty also establishes a virtually unqualified rule permitting United States corporations to organize, manage and control Italian corporations, subject only to certain guidelines under Italian law. In Article VII of the Treaty, there is a standard of reciprocity which requires the Respondent to allow United States corporations operating in Italy the same freedom to dispose of their immovable property or interests as is given to Italian corporations in the United States. The operative standard of treatment must be analyzed for each of the articles advanced by the United States.

Third, the Respondent is incorrect in implying that the United States' claim depends upon ELSI being a beneficiary under the Treaty. The Treaty provisions at issue specifically protect the rights, interests, and property of United States corporations such as Raytheon and Machlett, which invested in the Italian economy by means of an Italian subsidiary. The rights, interest, and property affected by the Respondent's actions belonged to Raytheon and Machlett, not ELSI[1]. In the case concerning the *Barcelona Traction, Light, and Power Company, Limited*, the Court recognized that whether particular rights and interests of shareholders are protected as a matter of international law may be governed in a particular case by the rules of an applicable international instrument[2]. The nature of the right, interest, or property at issue in this case is clear from the ordinary meaning of the Treaty provisions that apply within each category of protection. Those categories of protection are now discussed separately in light of the Counter-Memorial.

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[1] The argument of the United States before the United States Supreme Court in *Sumitomo Shoji America, Inc. v. Avigliano*, cited in the Counter-Memorial, *supra*, p. 36, is not relevant to this case. In *Sumitomo* the United States argued that the United States *subsidiary* of a Japanese corporation was not capable under the particular language of Article VIII (1) of the United States-Japan FCN Treaty to avoid application of United States federal law. That case dealt with language particular to Article VIII (1) of that FCN Treaty. Further, *Sumitomo* did not discuss in any way the right of Japanese corporations to raise claims under that FCN Treaty in United States courts.

[2] *Judgment, Second Phase, I.C.J. Reports 1970*, paras. 54, 61, 62.

CHAPTER II

INTERFERENCE WITH MANAGEMENT AND CONTROL OF ELSI

The Respondent requisitioned the ELSI plant, delayed its decision as to the lawfulness of the requisition, and thwarted the normal bankruptcy process, instead of allowing an orderly liquidation of ELSI. These acts constitute interference with Raytheon's and Machlett's management and control of their subsidiary. Articles III and VII of the Treaty and Article I of the Supplement bar the Respondent from engaging in such interference.

Section I. Article III of the Treaty

Article III of the Treaty guarantees that United States corporations may participate in corporate enterprises organized under the laws of Italy. Article III (2) creates a broad right for United States corporations to "organize, control and manage" Italian corporations engaged in commerce and manufacturing in conformity with applicable Italian law and regulations[1]. The facts of this case vividly show a denial of this right to control and manage. The respondent, however, tries to avoid application of the ordinary meaning of Article III (2) by making several incorrect assertions.

First, the Respondent contends that the unlawful requisition of the ELSI plant in "no way affected control by the shareholders" over ELSI, but rather "merely concerned the management by [ELSI] of some property belonging to [ELSI][2]". Yet a fundamental right of shareholders in controlling and managing a non-public corporation is the right to decide to liquidate or "wind-up" the business of that corporation. Under Article 17 of the By-Laws of ELSI, the right "of changing the legal nature of the Company, of winding up voluntarily the Company" was reserved exclusively to shareholders owning shares having an aggregate value of 90 per cent of the capital of ELSI[3]. After having made extensive investments in ELSI, Raytheon and Machlett alone had the right and the responsibility to decide to liquidate ELSI in an orderly fashion.

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[1] Art. III (2) of the Treaty states in part:

> "The nationals, corporations and associations of either High Contracting Party *shall be permitted*, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, *to organize, control and manage corporations* and associations of such other High Contracting Party *for engaging in commercial, manufacturing*, processing, mining, educational, philanthropic, religious and scientific *activities*." (Emphasis added.)

[2] Counter-Memorial, *supra*, p. 42. Contrary to the Respondent's assertion, the United States is not establishing an "autonomous principle of fair treatment". Counter-Memorial, *supra*, p. 35. The United States simply points out that the Treaty as a whole seeks to assure investors that investments will be given fair or equitable treatment. Memorial I, p. 72. The concern with equitable treatment is expressly stated in the Preamble to the Supplement, which of course constitutes an integral part of the Treaty. *See* Treaty Supplement, Art. IX. The existence of other standards of treatment such as national treatment and most-favored-nation treatment does not preclude application of fair treatment.

[3] ELSI — Elettronica Sicula S.p.A., By-Laws (Articles of Incorporation), Approved by the Shareholders Extraordinary Meeting of 19 July 1961, Art. 17 (Ann. 5 to this Reply).

Second, the fact that the requisition did not transfer ownership of ELSI to the Respondent[1] does not make the requisition any less of an interference with management and control. The requisition deprived any potential buyer of access to ELSI's physical assets, thereby making sale of ELSI as a going concern impossible. When President Carollo of Sicily informed Raytheon orally and in writing that the requisition would be prolonged indefinitely unless Raytheon abandoned its plan to wind up ELSI[2], it was clear that Raytheon and Machlett had completely lost their ability to manage and control ELSI, leaving them only the option of placing ELSI in bankruptcy as required by Italian law[3]. Ultimately the interference by the Respondent in the bankruptcy process even diminished the right of Raytheon and Machlett to receive any of the benefits of a normal bankruptcy sale, thereby forcing Raytheon and Machlett to pay off a greater share of ELSI's guaranteed debts that went unpaid due to the low proceeds from the bankruptcy. Whether or not the requisition involved transfer of title, it obviously involved interference with management and control.

Third, the Respondent seeks to justify its conduct under the first sentence of Article III (2) by asserting that the requisition was based on an Italian law and therefore was in "conformity with the applicable laws and regulations". Yet while that clause permits United States corporations to organize and control Italian corporations only within the guidelines established by local law, it does not call for United States corporations to receive treatment "no less favorable" than that accorded to corporations owned by local nationals, which is the clause used in the Treaty to trigger a national treatment standard[4]. Consequently the "applicable laws and regulations" clause must be interpreted to mean that the way in which management and control may be exercised is subject to regulation under local law, but the right to manage and control may not be abrogated entirely, regardless of the treatment accorded to Italian nationals[5].

Subject only to this constraint, the guarantee of treatment in the first sentence of Article III (2) is unqualified. Unqualified or "absolute" rules are used in FCNs to protect vital rights and privileges of foreign corporations in any situation, whether or not a host government provides the same rights to its own population[6].

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[1] Counter-Memorial, *supra*, p. 42.

[2] Memorial, I, pp. 55-56.

[3] *Ibid.*, pp. 56-57, 73-74.

[4] The "no less favorable" clause appears in various parts of the Treaty where a national treatment standard is intended. The clause also appears in the second sentence of Article III (2), but this sentence applies to corporations controlled by corporations in the other party. Hence, Article III (2) applies a national treatment standard to the rights and privileges *of ELSI* to engage in activities in Italy, but not to the rights of Raytheon and Machlett to control and manage ELSI.

[5] Herman Walker, a highly qualified writer in this area who was intimately involved in the negotiation of many FCNs, noted that the phrase "in conformity with applicable laws and regulations", as it occurs in this Treaty, "is framed in such a manner as to imply that it does not constitute a reservation detracting from the treaty rights; and such phraseology has been omitted from subsequent treaties". H. Walker, "Provisions on Companies in United States Commercial Treaties", 50 *American Journal of International Law*, p. 373, at p. 384, n. 53 (1956). In view of the possible ambiguity of this qualification, however, the Supplementary Agreement provided stronger protection by absolutely prohibiting arbitrary and discriminatory interference, whether or not in accordance with local law. *See infra*, Part V, Chap. II, Sec. 2.

[6] H. Walker, "Modern Treaties of Friendship, Commerce and Navigation", 42 *Minnesota Law Review*, p. 805, at pp. 811, 823 (1958). Mr. Walker states that in these situations foreign nationals are to receive "not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens". H. Walker, "Treaties for the Encouragement and Protection

In any event, the "applicable laws and regulations" clause cannot excuse the Respondent's conduct in this case because the requisition of the plant by the Respondent was *not* in conformity with applicable laws and regulations. The Prefect of Palermo found the requisition to be illegal because it was not directed toward the goal stated by the Mayor of Palermo. The highest Italian court confirmed the Prefect's finding. To be in conformity with applicable laws and regulations, it is not enough that the Mayor of Palermo referenced certain laws when he requisitioned the plant. If mere reference to local laws satisfies Article III (2), then all acts of the Respondent could be excused in this way and the protection of Article III (2) would be rendered meaningless.

Even if the first sentence of Article III (2) is read as providing for treatment no less favorable than is provided to Italian corporations, the presumption must be that this Article was not meant to deprive United States corporations of advantages they would have otherwise enjoyed under international law[1]. Hence Article III (2) includes certain minimum standards of protection under international law, including protection from unlawful interference with management and control[2].

Thus, under either the standard set forth in Article III (2) or even under a national treatment standard, unlawful interference in the management and control of a United States-owned subsidiary violates Article III (2) of the Treaty.

Section 2. Article I of the Supplement

Article I *(a)* of the Supplement guarantees that United States corporations shall not be subject to arbitrary or discriminatory measures in Italy resulting particularly in preventing their effective control and management of enterprises which they have been permitted to establish or acquire in Italy[3]. This provision complements and reinforces the protections accorded to Raytheon and Machlett under Article III by establishing a completely unqualified rule[4] prohibiting inter-

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of Foreign Investment: Present United States Practice", 5 *American Journal of Comparative Law*, p. 229, at p. 232 (1956). Unqualified rules state the law of the treaty itself and may be assessed, as relevant, in accordance with principles of international law.

[1] H. P. Connell, "United States Protection of Private Foreign Investment through Treaties of Friendship, Commerce, and Navigation", 9 *Archiv des Volkerrechts*, p. 256, at p. 266 (1961-1962) (quoting Schwarzenberger at note 49: "Even if the standard of national treatment is laid down in a treaty, the presumption is that it has been the intention of the parties to secure to their nationals in this manner additional advantages, but not to deprive them of such rights as in any case, they would be entitled to enjoy under international customary law or the general principles of law recognized by civilized nations").

[2] When a State admits into its territory foreign investments in the form of juristic persons, that State is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them. Such obligations include the obligation to refrain from acts that deprive investors of the right to exercise management and control of their investment. *See, e.g., Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, 56 *International Law Reports*, p. 258, at pp. 290-293, 295 (1980). The unlawful interference with Raytheon's and Machlett's management and control by the Respondent was a breach of its obligations under customary international law as preserved by the Treaty.

[3] Art. I *(a)* of the Supplement states:

> "The nationals, corporations and associations of either High Contracting Party *shall not be subjected to arbitrary or discriminatory measures* within the territories of the other High Contracting Party resulting particularly in: *(a) preventing* their *effective control and management of enterprises* which they have been permitted to establish or acquire therein . . ." (Emphasis added.)

[4] *See supra*, note 6, p. 382, and accompanying text.

ference with control and management by arbitrary and discriminatory conduct, regardless of Italian laws and regulations.

The Counter-Memorial strains to interpret the Respondent's actions as being directed only at ELSI and therefore as having no effect on Raytheon and Machlett's property[1]. Yet Article I *(a)* of the Supplement does not refer to property at all; it refers to control and management of enterprises established or acquired in Italy, which is precisely what is at issue here. Raytheon and Machlett were most certainly "subjected to" measures in Italy "resulting in" the prevention of their effective control and management of ELSI. The Respondent pretends that "the company organs, through which this control and management were performed, were able to function freely also during the period of the requisition"[2]. The "company organs" could still function, but there was nothing left for them to control and manage. This is precisely what Article I *(a)* of the Supplement was designed to prevent[3].

The Counter-Memorial tries to avoid Article I *(a)* by arguing that the requisition was not arbitrary because "arbitrary" means the same as "unreasonable" and the requisition was a reasonable step to take to deal with an emergency. The requisition was *both* arbitrary and unreasonable regardless of the problems of "social unrest" alleged by the Mayor of Palermo and used as the pretext for the requisition[4]. First, both the Prefect of Palermo and the Italian courts declared that the requisition was an unlawful act. An unlawful act is not a reasonable act under any system of legal obligations. Indeed the Prefect himself found that the law was "destitute of any juridical cause which may justify it or make it enforceable" and could not achieve the asserted objective of alleviating social unrest[5]. Second, the subsequent fate of ELSI shows that once the Respondent requisitioned the plant, the Respondent took absolutely no steps to alleviate the "social unrest", such as by reopening the plant. The goal expressed in the requisition order was not obtainable by the act he took and was therefore arbitrary. Third, even if the Respondent's actions were reasonably related to the goal stated, requisitioning a plant for political reasons is not a legally permissible goal under the Treaty. Indeed, the Respondent was completely unresponsive to Raytheon's and Machlett's efforts to stabilize ELSI financially, precipitating the conditions which led to the "social unrest". The real purpose of the requisition was not to stem "social unrest", but to wrest control of ELSI's plant, equipment, and assets from its rightful shareholders, Raytheon and Machlett. That purpose was arbitrary.

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[1] Counter-Memorial, *supra*, p. 43. The Respondent's reading of this article runs counter to its asserted acceptance of the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Counter-Memorial, *supra*, pp. 30-31. The United States agrees that the rules of the Vienna Convention apply to the interpretation of this Treaty. The ordinary meaning of Article I *(a)* as well as the other provisions cited by the United States establishes the Respondent's wrongful conduct. Further the ordinary meaning of these provisions is the proper meaning within the context of the Treaty as a whole and in light of its object and purpose, which includes the promotion and protection of foreign investment. If reference to supplementary means of interpretation is necessary, in accordance with Article 32, these too confirm the interpretation of the Treaty provisions advanced by the United States.

[2] Counter-Memorial, *supra*, p. 43.

[3] At the time of the ratification of the bill introduced to implement the Supplement, the Respondent noted that "the first part of the [Supplement], which is certainly the most important, refers to the free transfer of capital and income by natural and corporate persons from the two contracting States, and their freedom to manage the companies which these natural or legal persons establish or procure." Counter-Memorial, Ann 11, *supra*, p. 126.

[4] Counter-Memorial, *supra*, p. 12.

[5] Memorial, Judgment of Prefect of Palermo, 22 Aug. 1969, I, p. 362 (Ann 76). *See* Memorial, I, p. 64. The Prefect found that the requisition could not possibly have achieved its stated purposes, because the requisition could not result in the re-employment of the workers or in the continued operation of the plant.

The existence of Italian laws which in some situations allow the Mayor of Palermo to requisition property does not make reasonable the improper and arbitrary application of those laws. Municipal legal systems, including those of Italy and the United States, and principles of international law, recognize that where the means employed do not fit the expressed goal, or are legally impermissible, then those means are arbitrary and unreasonable[1]. Within the context of the Treaty itself, which has as an objective the promotion of investment, the actions of the Respondent in seizing Raytheon's and Machlett's investment are also unreasonable and arbitrary.

The Respondent contends that the requisition was not discriminatory because requisitions of this kind frequently have been used with regard to plants belonging to Italian-owned companies. The Treaty, however, envisions protection from not just discrimination against foreign companies, but also from discrimination in favor of Government-controlled enterprises[2]. It is not sufficient to point to other requisitions where the Respondent also took over companies that were competitive with its own. Therefore at the time that Raytheon and Machlett invested in ELSI, and at the time this requisition occurred, Italian corporations apparently had never been treated in this fashion, and therefore the requisition may be said to be discriminatory.

Section 3. Article VII of the Treaty

Further protection against interference with management and control is given by Article VII of the Treaty. Article VII states that a United States corporation is entitled to acquire, own, and dispose of its immovable property or interests therein in Italy on terms no less favorable than those accorded to Italian corporations by the state of the United States under which the United States corporation is created[3].

The Respondent contends that since the plant and assets belonged to ELSI, the only property to which Article VII could apply is the shares in ELSI held by Raytheon and Machlett; since Raytheon and Machlett were free to dispose of their shares at all times, Article VII was not violated. Even if the protection of Article VII were limited to the shares, the value of Raytheon's and Machlett's shares was essentially reduced to nothing. Prior to the requisition, the shares had a value reflecting ELSI as a going concern, and the shareholders could control and manage fundamental changes in the status of ELSI, such as an orderly liquidation. After the requisition, however, Raytheon and Machlett were only "free" to dispose of their shares by declaring ELSI bankrupt and by paying portions of ELSI's guaranteed debts that would have been paid from proceeds of an orderly liquidation.

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[1] Memorial, I, pp. 77-80.

[2] *See*, e.g., Art. XVIII of the Treaty and para. 2 of the Protocol.

[3] Art. VII of the Treaty states in part:

> "The nationals, corporations and associations of either High Contracting Party shall be permitted to . . . dispose of immovable property or interests therein within the territories of the other High Contracting Party upon the following terms:
>
> ....
>
> (*b*) in the case of nationals, corporations and associations of the United States of America, the right to acquire, own and dispose of such property upon terms no less favorable than those which are or may hereafter be accorded by the States, territory or possession of the United States of America . . . under the laws of which such corporation or association is created or organized, to . . . corporations . . . of the Italian Republic; provided that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may hereafter be accorded within the territories of such Republic to nationals, corporations and associations of such Republic."

Yet Article VII is actually concerned with "immovable property or interests therein". "Interests" in property is a phrase sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States corporation[1]. Raytheon's and Machlett's interests in ELSI's plant, equipment, and work-in-process were obliterated by the unlawful requisition and subsequent treatment in the bankruptcy process. The fact that the requisition period was for six months is irrelevant since Raytheon and Machlett, facing no prospect of an orderly liquidation, were forced to have ELSI declared bankrupt within the first month of the requisition.

The standard of treatment operating in Article VII is one of reciprocity. A national treatment standard is applied only if the reciprocity standard is higher than the standard of national treatment. To establish the reciprocity standard of treatment, the United States has shown that under both Delaware and Connecticut law, corporations may be dissolved and their assets sold pursuant to determinations of their boards of directors and shareholders[2]. If Delaware or Connecticut were to interfere substantially with a parent corporation's right to dissolve its subsidiary, even if for a lawful public use, it would be obligated to pay compensation for that property[3]. The Respondent has not shown that this standard of treatment is higher than that accorded by the Respondent to its own corporations. Unless the Respondent can show that it may illegally requisition a wholly owned subsidiary of an Italian corporation, without paying compensation to that corporation, then the standard of reciprocity applies.

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[1] *Starrett Housing Corp et al.* v. *Islamic Republic of Iran*, Awd. No. 314-24-1, p. 124 (14 Aug. 1987); *Amoco International Finance Corp.* v. *Government of Iran*, Partial Awd. No. 310-56-3, pp. 47-48 (14 July 1987); *Sedco Inc.* v. *National Iranian Oil Company*, Awd. No. 309-129-3, pp. 22-23 n. 9 (7 July 1987) ("The term 'interests in property' clearly is broad enough to encompass property owned indirectly through subsidiary corporations").

[2] Memorial, I, pp. 81-82.

[3] The duty to compensate extends beyond property rights taken solely pursuant to a formal expropriation decree. Memorial, I, p. 82.

CHAPTER III

IMPAIRMENT OF INVESTMENT RIGHTS AND INTERESTS

The previous chapter concerned Treaty provisions that protected investors' rights in managing and controlling their investment. This chapter concerns an equally significant protection against measures that impair the value of that investment. Article I (*b*) of the Supplement provides that United States corporations shall not be subjected to arbitrary and discriminatory measures in Italy which result particularly in impairing either their legally acquired rights and interests in Italian enterprises or their investments[1]. Specifically, the Supplement protects against impairment of rights, interests, and investments "in the form of funds (loans, shares, or otherwise)".

This broad language envisions protection of *all* financial commitments made for the benefit of ELSI, whether in the form of direct capital contributions, loans, loan guarantees, or open accounts[2]. Further, the financial loss incurred by Raytheon in defending the suits brought by Italian banks subsequent to the Respondent's arbitrary measures is also within the scope of the Supplement because that loss represents a burden on or impairment of Raytheon's legally acquired interests in ELSI[3]. The requisition of the plant, which caused Raytheon and Machlett to place ELSI in bankruptcy, and the subsequent acquisition of the plant, assets, and work-in-process of ELSI, clearly impaired investment rights and interests in ELSI. The requisition prevented voluntary liquidation of ELSI and caused it to file for bankruptcy. The impairment continued with the subsequent conduct of Italian officials in a series of concerted actions to acquire for ELTEL the ELSI plant and assets at less than fair market value, leaving Raytheon to pay ELSI's outstanding guaranteed debts and to defend lawsuits brought by ELSI's unsecured, unguaranteed debtors[4].

Once again the Respondent argues that the property of Raytheon and Machlett was not actually affected by the requisition because it was addressed to ELSI[5]. But Article I (*b*) of the Supplement does not protect against just direct seizure of tangible property belonging to United States investors; it prohibits arbitrary and discriminatory measures which "impair" United States corporation's rights and interests in and loans to Italian entities[6]. Clearly Raytheon's and Machlett's rights and interests were impaired. Acceptance of the Respondent's argument would eviscerate the ordinary meaning of this article.

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[1] For a discussion of the arbitrary and discriminatory nature of the Respondent's acts, *see supra*, Part V, Chapter II, Sec. 2.

[2] The Respondent seeks to differentiate between such financial commitments, Counter-Memorial, *supra*, p. 48, but there is no basis in the language of the Treaty for doing so. Loan guarantees represent as much of a financial commitment as any direct loan, especially where, as in this case, the guarantor actually has to pay off the loan. The Respondent itself has recognized that investments which are eligible for protection include equity interests in the form of loan guarantees. *See Operational Regulations of the Multilateral Investment Guarantee Agency*, Art. 1.04 (vi), signed by Italy on 17 Feb. 1986.

[3] Memorial, I, p. 85.

[4] *Ibid.*, at pp. 85-88.

[5] Counter-Memorial, *supra*, p. 43.

[6] The ordinary meaning of "impair" suggests a wide scope of protection. This interpretation comports with the desire of Italy in negotiating the Supplement "to remove any obstacles to the inflow of private American capital . . .". Italian Ann. 9, *supra*, p. 112.

CHAPTER IV

WRONGFUL TAKING OF INTERESTS IN PROPERTY

The Treaty also protects against government taking of property without compensation. Article V (2) of the Treaty provides that property of United States corporations within Italy shall not be taken without due process of law and without the prompt payment of just and effective compensation[1]. Paragraph 1 of the Protocol to the Treaty provides that the provisions of Article V (2) shall "extend to interests held directly or indirectly" by United States corporations. Both the Respondent's act of requisitioning the ELSI plant and its subsequent acts in acquiring the plant, assets and work-in-process singly and in combination constitute takings of property without due process of law or just compensation.

The Respondent agrees that Article V (2) accords protection to United States corporations against the taking of property and agrees that this protection was extended by the Protocol to interests held directly or indirectly by a United States company[2]. Yet despite unambiguous language to the contrary, the Counter-Memorial implies that the standard of protection in the Protocol given to "interests held directly or indirectly" is somehow different than the standard of protection given to property in Article V (2) of the Treaty[3]. This is contrary to the explicit language of the Protocol which states:

> "The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly by . . . corporations . . . of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

There is no mention in the Protocol of any different standard of protection from that which exists in Article V; to the contrary, the Protocol "extends" Article V (2). The weakness of the Respondent's interpretation is further made evident in that the Respondent does not even try to establish what this different standard is or whether the standard was met in the treatment of Raytheon and Machlett.

The Counter-Memorial also asserts that Paragraph 1 of the Protocol accords protection "only to rights to property" because the Italian text of the Protocol uses the word "diritti" (which can be translated as "rights") and Vienna Convention Article 33 (4) requires application of the more restrictive meaning[4]. Although "interests" properly reflects the meaning of "diritti" in the Protocol[5], it must be recognized that the Protocol extends Article V to interests (or under the Respondent's interpretation "rights") "held directly or indirectly" by Raytheon and Machlett. Therefore it is clear that indirect rights to property are also protected[1].

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[1] Article V (2) of the Treaty provides that:

> "The *property* of nationals, corporations and associations of either High Contracting Party *shall not be taken* within the territories of the other High Contracting Party without due process of law and *without the prompt payment of just and effective compensation*." (Emphasis added.)

[2] Counter-Memorial, *supra*, p. 40.

[3] *Ibid.*

[4] *Ibid.*

[5] "Diritti" is also translated as "interests" in other parts of the Treaty, such as Art. VII (1) *(a)*.

The Respondent denies that the requisition of the ELSI plant can be considered an "expropriation" or "taking" of property, since it was simply a "requisition in use" for which the Commune of Palermo received no financial benefit[2]. Yet a "taking" is generally recognized as including not merely outright expropriation of property[3], but also unreasonable interference with its use, enjoyment, or disposal[4]. The requisition of the plant prevented an orderly liquidation of ELSI, thereby causing Raytheon and Machlett to place ELSI in bankruptcy. The Respondent then proceeded through ELTEL to acquire the ELSI plant and assets for less than fair market value. Consequently the Respondent's acts so substantially interfered in the use and disposal of Raytheon's and Machlett's indirect interests in the ELSI property that a taking occurred. This taking gave rise to a right to compensation.

Whether the Commune of Palermo ultimately gained from the action of its Mayor is irrelevant. The Treaty does not require that the Respondent benefit from its taking; it is sufficient that Raytheon and Machlett were deprived of the use and disposal of their interests in ELSI. In any event, the Respondent gained considerably from this requisition because it prevented an orderly liquidation of ELSI and led to ELTEL's acquisition of ELSI's plant, assets, and work-in-process for far less than ELTEL would have had to pay had there been no interference.

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[1] The Respondent's reliance on Article 34 (3) of the Vienna Convention on the Law of Treaties is also misplaced. By its terms Article 33 (4) should not be used unless interpretation in accordance with Articles 31 and 32 does not resolve the difference of meaning. An analysis under Articles 31 and 32 of the meaning of "diritti" shows that the Protocol, placed in context as an extension of Article V, goes beyond the protection accorded in Article V to direct property rights. Therefore the Protocol seeks to protect "interests" in property, not just "rights" in property, since "rights" in property are already protected by Article V. Even if resort to Article 33 (4) of the Vienna Convention is necessary, that Article does not call for application of the most restrictive meaning, but rather the application of the meaning which best reconciles the two texts, having regard to the object and purpose of the Treaty. Both international courts, e.g., *Wemhoff* case [1968], *Pub. Eur. Ct. of Human Rights*, Ser. A (Judgment of 27 June 1968), and even Italian courts, e.g., *Ministero della Difesa* v. *Società Rimorchiatori Napoletani*, Cassazione, 9 Dec. 1974, No. 4106, pp. 307-309, have rejected the approach taken here by the Respondent.

[2] Counter-Memorial, *supra*, pp. 11, 40.

[3] The use of "beni espropriati" in the Italian text of the Treaty should not be read as a restriction on this protection. The Respondent itself recognized that the principle of expropriation was developed in Article V precisely for the purpose of protecting the investment of capital in a broad sense.

> "The advisability and importance of this clause is quite evident because of the peculiar economic and financial structure of our country, in which the accumulation of savings does not correspond to productive needs or to any program of full employment. The influx of foreign capital represents an indispensable supplement for our country."

Memorial, Chamber of Deputies, Parliamentary Proceedings Documents — Bills and Reports, N. 246-A, Page 4, Presented to the Office of the President, 2 Mar. 1949, I, p. 117 (Ann. 3). *See* Counter-Memorial, Ann. 4, *supra*, p. 63.

[4] For an extensive discussion of the concept of "taking" and "expropriation" in international law, *see* Memorial, I, pp. 89-92.

CHAPTER V

FAILURE TO PROVIDE PROTECTION AND SECURITY

A final area of protection under the Treaty denied to Raytheon and Machlett concerned the protection and security of their property. Article V (1) of the Treaty provides that United States corporations shall receive in Italy the most constant protection and security for their property, and shall enjoy in this respect the full protection and security required by international law[1]. Article V (3) provides that United States corporations shall receive in Italy no less protection and security than that accorded to Italian corporations and other foreign corporations.

The delay in ruling on the challenge to the requisition order until immediately after the ELSI plant, equipment and work-in-process had been acquired by ELTEL was a denial of the level of procedural justice accorded by international law[2]. Normally the legality of the requisition would have been reviewed within 30 days after the date the ruling was sought, which in the case of ELSI was on 19 April 1968[3].

A timely decision by the Prefect could have avoided the need to place ELSI in bankruptcy because while the voluntary petition in bankruptcy was filed on 26 April 1968, ELSI was not in fact declared bankrupt until 16 May 1968. Thus, if the requisition had been rescinded, the bankruptcy could have been avoided by ELSI asking the bankruptcy judge to deny the petition.

The occupation of the plant, which resulted in its deterioration and impeded the Trustee's efforts to dispose of it, occurred with the tacit approval of the local government authorities[4]. It no doubt discouraged potential buyers from inspecting the plant and assets and generally chilled the process of selling ELSI for its full value. Therefore this action also constituted a denial of "constant protection and security", thereby violating Articles V (1) and (3) of the Treaty regardless of whether physical damage actually occurred from the occupation.

The Respondent implies that Article V only protects immovable property and any failure in ruling within a reasonable time or in protecting the plant was not a failure to protect immovable property of Raytheon and Machlett. This construction of Article V is unjustified. Article V (3) states:

> "The . . . corporations . . . of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and

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[1] Art. V (1) of the Treaty states in pertinent part:

> "The nationals of each High Contracting Party *shall receive*, within the territories of the other High Contracting Party, the *most constant protection and security for their* persons and property, and shall enjoy in this respect *the full protection and security required by international law*." (Emphasis added.)

[2] Memorial, I, pp. 99-100.

[3] *Ibid.*, p. 64.

[4] *Ibid.*, pp. 100-101. The Respondent is incorrect that the occupation of the plant by the workers occurred prior to the requisition. Although some brief, intermittent strikes known in Italy as "hiccup" strikes occurred at the plant prior to 1 April 1968, there was no long-term, indefinite control of the plant by the workers. Memorial, Ann. 21, paras 16-17. Further, the Respondent did not do anything to keep the workers out of the plant nor to "preserve" the value of the plant.

> security with respect to the matters enumerated in paragraphs 1 and 2 of this Article."

Articles V (1) and (2) speak of protection and security for "persons" and "property", not "immovable property". Property in its ordinary sense is not confined to immovable property[1], and when the Treaty intends to cover immovable property, such as in Article VII, it expressly says so.

In this case, the property of Raytheon and Machlett in Italy was ELSI itself. The entire entity of ELSI — plant, equipment, receivables, inventories, goodwill, and other intangibles — was at stake when the requisition occurred. The Respondent was obligated to protect ELSI from the deleterious effects of the unlawful requisition. The failure to overturn the Mayor's order, and the failure to provide ELSI with any security from trespass, deprived Raytheon and Machlett of the security and protection for their investment to which they, as 100 per cent owners of ELSI, were entitled.

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[1] For instance, under rules of customary international law, takings of property concern expropriation of all rights in the investment, not just in the right to possession of immovable plant and equipment. *See, e.g., Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, 56 *International Law Reports*, pp. 258, 290-293.

PART VI. COMPENSATION

CHAPTER I

THE DUTY TO PAY AND MEASURE OF COMPENSATION

As set forth in the United States Memorial, the United States is entitled to compensation in the full amount of the losses resulting from the wrongful conduct of the Government of Italy[1]. Compensation should be measured in this case by the injuries suffered by Raytheon and Machlett[2].

All of the injuries suffered by Raytheon and Machlett should be included in the measure of compensation. A State may discharge its duty to make reparation by implementing measures designed to re-establish the situation prior to the wrongful act, i.e., *restitutio in integrum*[3]. Where it is not possible to restore the situation that would have existed if the wrongful act had not been committed, or restoration does not fully redress the injury caused by the State's unlawful act, damages should be awarded in lieu of restitution to compensate for all losses or injury caused by a State's wrongful acts[4].

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[1] For a complete discussion of Respondent's obligation to make full compensation, *see* Memorial, I, pp. 102-103.

[2] The Respondent correctly notes that the losses suffered by nationals are not necessarily identical to those suffered by the State. Counter-Memorial, *supra*, p. 47, n. 3. However, international tribunals and commentators have recognized that damage to the national as a result of a violation of a treaty or customary international law may serve as a measure of the compensation to the injured State, particularly where, as in this case, the treaty provision was designed to protect the parties' respective nationals and the violation of the treaty provision caused direct financial loss to the national. *See* Memorial, I, pp. 103-106.

[3] Memorial, I, p. 104.

[4] *Ibid.*, pp. 104-106.

CHAPTER II

THE NATURE OF THE INJURY

Section 1. Raytheon and Machlett Suffered Financial Losses with Respect to Loan Guarantee Payments, Return of Investment and Open Accounts

The requisition directly prevented the orderly liquidation of ELSI. Had the Respondent not interfered with the liquidation, Raytheon and Machlett would have recovered the market value of ELSI as a going concern in 1968. The book value of ELSI — the closest available approximation of going concern value in this case[1] — was 17,053.5 million lire as of 31 March 1968. This amount would have allowed payment of all of ELSI's creditors in full (including Raytheon)[2], payment of all administrative costs, and would have even returned 391 million lire to Raytheon and Machlett as a small return of the large investments they had previously made in ELSI. This amount would have been insufficient to recoup Raytheon's and Machlett's investment in ELSI, since they still would have lost over US$11 million in investments made since 1956.

By contrast, the Trustee in bankruptcy recovered only 6,373.8 million lire from the sale of ELSI's assets to ELTEL. Raytheon and Machlett, therefore, lost the full value of their open accounts with ELSI[3] and, more importantly, were required to pay all of the guaranteed loans[4], thus incurring some 6,931.4 million lire in losses. The difference between Raytheon's and Machlett's position had they been permitted to proceed with the orderly liquidation (recovery of 391 million lire) and the losses they sustained as the result of the Respondent's interference (net loss of 6,931.4 million lire) is 7,322.4 million lire (US$11,739,200)[5].

Section 2. Raytheon Incurred Substantial Legal Expenses

In addition, as a further direct consequence of the Respondent's actions in violation of the Treaty, Raytheon incurred more than US$939,800 in outside legal and related expenses in connection with the bankruptcy proceedings, in defending against suits brought by Italian bank creditors in Italian courts, and in pursuing its claim against the Respondent for its actions against ELSI[1]. The Respondent's allegation that the legal expenses incurred by Raytheon were not proximately caused by the infringement of the Treaty must be rejected. As a factual matter, had the Respondent permitted Raytheon and Machlett to proceed with the orderly liquidation plan, Raytheon would not have incurred these costs since the banks would have been paid in full or in settlement.

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[1] *See infra*, Part VI, Chapter III.

[2] The United States has declined to claim compensation based both on sale of ELSI's assets for book value *and* settlement with the large unsecured, unguaranteed creditors. The damages claimed in this case are based on the premise that had Raytheon and Machlett recovered book value or greater, all creditor claims could have been satisfied in full.

[3] That Raytheon and Machlett declined to file a claim for their open accounts with ELSI in the bankruptcy process is irrelevant to the question whether they are entitled to recover the losses associated with the open accounts as a result of the Respondent's violations of the Treaty. However, it should be noted that the principal reason Raytheon did not seek recovery for the open accounts in the bankruptcy process was the inescapable fact that due to the requisition and Respondent's subsequent interference in the bankruptcy process, Raytheon and Machlett would not have recovered sufficient compensation in the bankruptcy process to justify the cost of filing a claim for their open accounts.

[4] The Court should reject the Respondent's assertion that the Respondent is not responsible for payments of the guaranteed loans. First, as demonstrated *supra*, Part V, Chapter III, guaranteed loans are a type of investment specifically protected by the Treaty. Equally important, Raytheon's out-of-pocket expenses associated with payment of the guaranteed loans would not have been incurred but for the Respondent's requisition of ELSI's plant and assets, and are therefore a direct loss compensable under international law. *See* Memorial, **I**, p. 106.

[5] For a complete discussion of Raytheon's and Machlett's actual financial losses as compared to the planned orderly liquidation, *see* Memorial, **I**, pp. 106-108.

Furthermore, reimbursement for legals costs arising from an unlawful act is widely recognized by international tribunals[2].

Section 3. Compensation Received by the Trustee for the Unlawful Requisition Was Inadequate

The only "compensation" paid for the requisition was limited to 114 million lire, considered to be the rental value of ELSI during the requisition period. The Court of Appeals of Palermo rejected the claim by the Trustee for the diminution of the value of ELSI's assets and for ELSI's inability to dispose of its plant and assets during the same period[3]. The amount of the judgment was paid to the Trustee who, after deducting costs and expenses, distributed the proceeds to ELSI's creditors[4]. This amount has been taken into account in the calculation of compensation requested in this case.

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[1] For a complete discussion of the legal and related expenses incurred by Raytheon, see Memorial, I, pp. 109-110. The Counter-Memorial asserts that Raytheon was awarded costs by Italian legal courts, which include "fees corresponding to lawyers tariffs". Counter-Memorial, *supra*, p. 49. Raytheon did receive nominal court costs, but this amount was not sufficient to cover all legal expenses.

[2] Memorial, I, p. 109. *See* M. Whiteman, Vol. III, *Damages in International Law*, pp. 1998, 2005, 2020-2021 (1943), discussing the cases of *Thomas W. Mather (United States v. Mexico)* (award included amount for legal expenses incurred by claimants to procure the return of gold seized by Mexican troops) and the *Louisa (United States v. Mexico)* (award included amount for legal expenses incurred in prosecution of claim relating to seizure of cargo); L. Sohn and R. Baxter, "Convention on the International Responsibility of States for Injuries to Aliens" ("revised Harvard Draft Convention"), *reprinted in* F. V. Garcia-Amador, L. Sohn and R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, p. 133 (1974) (Art. 36 states that a "claimant shall be reimbursed for those expenses incurred by him in the local and international prosecution of his claim which are reasonable in amount and the incurrence of which was necessary to obtain reparation on the international plane").

[3] Memorial, Ann. 81.

[4] *Ibid.*, Ann. 26, Attachment.

CHAPTER III

ENTITLEMENT TO THE VALUE OF ELSI AS A GOING CONCERN

The starting point for the calculation of compensation is the value that would have been realized by Raytheon and Machlett by the sale of ELSI as a going concern in the orderly liquidation. Going concern value typically includes the fair market value of the company's assets and the future profits of the company's continued operations. In ELSI's case, however, the actions of the Respondent made it impossible for ELSI to become self-sufficient. Thus, while those familiar with ELSI's operations and its potential for sale determined that the intangible value of ELSI's product lines in an orderly liquidation would command a value[1], it was not then — and is not now — possible to place an exact value on these assets or on the future earnings potential of each line.

The closest remaining approximation of ELSI's going concern value is the book value of the assets as of 31 March 1968: 17,053 million lire. Book value, being merely an accounting tool, does not measure going concern value as such, because it merely values assets at acquisition cost less depreciation. This is so also with respect to any asset, such as land and buildings, which may have appreciated in value. It does not measure the actual market value of the assets or the full intangible value of the company, and therefore understates ELSI's real economic worth[2].

The Respondent does not argue that the United States is not entitled to the value of ELSI as a going concern. Instead, the Respondent argues that book value does not reflect the market value of the assets[3]. First, the balance sheet drawn up as of 31 March 1968 was current within the framework of ELSI's system of financial accounting, was supported by reliable records, and therefore is the valuation that most closely approximates the value of ELSI's assets at that time[4]. Second, while book value does not take into account the deterioration in value of ELSI's assets as a result of the delay caused by the bankruptcy, Raytheon and Machlett are entitled to the value of ELSI at the time of the Respondent's wrongful interference with the orderly liquidation, not at the expiration of, or at any point during the bankruptcy process. It was the Respondent — not Raytheon or Machlett — who caused and interfered with the bankruptcy process and thereby caused the delay in the purchase of ELSI's assets. The Respondent, therefore, is responsible for any decrease in the value of ELSI's assets due to this delay.

The Counter-Memorial also implies that the Court should reject the compensation sought on the basis that it is supported by "documents originating from ELSI or Raytheon or on affidavits of persons closely connected with Raytheon"[5]. Again, this assertion should be rejected. International arbitrations have long accorded probative value to affidavits of interested parties, particularly those that are based on personal knowledge and are corroborated by contemporaneous business records, such as those presented in support of this case[1].

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[1] Memorial, Ann. 13, para. 15.

[2] Of course, if the Respondent had made available the investment incentives it had promised or had otherwise become involved with ELSI prior to the requisition, ELSI's book value would have been substantially higher.

[3] *See* Counter-Memorial, *supra*, p. 47.

[4] *See supra*, Part II, Chapter I, Sec. 3.

[5] Counter-Memorial, *supra*, p. 47.

The Respondent does not offer an alternative method of valuation. Instead, the Respondent merely questions whether some other measure properly reflects the value of ELSI. As the following discussion demonstrates, neither the quick-sale value, the valuation performed by the judicial valuator, nor the valuation submitted by ELTEL properly establish the market value of ELSI in the spring of 1968.

Consistent with its recognized limited use, ELSI's management created a worst case scenario for the sale of ELSI's assets for purposes of internal corporate planning by ELSI's shareholders. In so doing, they established what is referred to as a "quick-sale" value. This value was calculated by discounting the book value of ELSI's assets in order to identify a worst-case minimum realizable value of ELSI's plant and tangible assets in an orderly liquidation. The quick-sale value was an internal determination of the minimum guaranteed return on the sale constructed for planning purposes. It does not reflect the full value of ELSI's tangible assets or their market value, nor does it take into account the significant intangible value of ELSI's business[2]. In addition, it did not include construction in process, studies in process, deferred costs and other smaller book-value items[3].

The Counter-Memorial erroneously places substantial probative weight on the United States use of the quick-sale value in the 1974 diplomatic claim. Obviously, the use of a quick-sale value in the original claim is not dispositive of the proper measure of ELSI's going concern value. The value was used as a matter of convenience in the diplomatic claim and in the spirit of compromise on which a settlement of the dispute might be based. As this claim has now been brought to the Court for resolution, the United States has a right to the full measure of compensation for injuries imposed by the Respondent.

The valuations performed by the bankruptcy valuator and the valuation submitted by ELTEL should both be rejected as they do not assess the going concern value of ELSI at the time of the requisition. The bankruptcy valuator attempted to value ELSI's assets as of 11 October 1968, more than five months after the time of the Respondent's wrongdoing. Moreover, the valuation which was presented to the bankruptcy judge by ELTEL two days after the third auction, and more than a year after the illegal requisition, clearly under-valued ELSI's plant, machinery and equipment[4]. This valuation also failed to include all of ELSI's assets, such as those in Milan and Rome, and the X-ray, semiconductor, complex components and other product lines. Of course this valuation was prepared by ELTEL's parent company, Siemens S.p.A., itself a member of the IRI group, and therefore cannot be considered an objective assessment of ELSI's true value.

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[1] Sandifer, *Evidence Before International Tribunals*, (1975), pp. 351-355; *see, e.g., Gill* case, 5 *Reports of International Arbitral Awards*, pp. 157-159 (1931) (affidavit corroborated by letters from British Minister and employer); *Stacpoole* case, 5 *Reports of International Arbitral Awards*, pp. 95, 96 (affidavit corroborated by distinterested party seven years after loss); *Tracy* case, 5 *Reports of International Arbitral Awards*, pp. 90, 92 (1930) (claimant's affidavit corroborated by affidavit from someone in position to know the facts of loss).

[2] The intangibles include ELSI's reputation as a producer of reliable electronic products, experience and know-how in the electronics industry, its supplier and customer lists and market reputation, patent licenses and other rights to technology supplied by Raytheon and Machlett, the technical assistance agreements that would have been executed by Raytheon and the new purchasers, and the value of existing contracts.

[3] The difference between the 193 million lire quick-sale price and the 217 million lire price established by the court-appointed valuator for work in process is stark evidence of the artificially low value of the quick-sale estimate for purposes of a worst-case scenario.

[4] Counter-Memorial, Vol. 5 (Unnumbered Documents, Vol. III).

CHAPTER IV

THE AWARD OF INTEREST

Compensation awarded should include interest, compounded annually, from the date of the requisition until the date of the award[1]. The circumstances in this case not only call for an award of interest but also require that the rate and calculation of the total amount reflect the commercial realities of the case. Raytheon and Machlett invested in ELSI with the goal of obtaining a return on their investment. These same commercial considerations were paramount in Raytheon's and Machlett's decision to engage in an orderly liquidation of ELSI's assets. The Respondent's requisition of ELSI's assets and interference with the ensuing bankruptcy frustrated Raytheon's and Machlett's investment objective, deprived Raytheon and Machlett of funds to satisfy ELSI's creditors, and caused Raytheon and Machlett to pay ELSI's debts from its own funds. Thus, the Respondent is responsible for the loss of the use of the revenue and funds over time.

The Respondent asks this Court not to award interest because the application to the Court could have been made "many years earlier"[2]. However, the Respondent presents no legal support for the proposition that delay in filing a claim is a bar to an award of interest. The Respondent's argument is also based on a faulty factual premise — that any delay in the filing of the claim is attributable to actions of the United States, Raytheon, or Machlett. The injured parties did not delay in seeking redress for their grievances. The claims asserted in this case were communicated to the Respondent immediately after the requisition and by a diplomatic claim provided to the Respondent in 1972 and formally presented in 1974. Subsequent to the presentation of that claim, the two Governments have been in diplomatic communication in an attempt to reach a negotiated settlement of the dispute. In short, the Respondent can claim no prejudice as a result of the passage of time which would entitle it to a reduction in or absolution from the obligation to pay interest on this claim or to attribute the delay to the claimants. Indeed, Respondent has *benefited* from the value of Raytheon's and Machlett's lost investment in ELSI since the time of the requisition and should now be held accountable for it.

The Respondent's reliance on the *Corfu Channel* case as a basis for denial of an award of interest is misplaced[3]. The question of interest was not before the Court in that case, as the United Kingdom did not assert a claim for interest. Thus, the Respondent has presented no basis for a refusal to award interest in this case.

Interest awarded should be compounded annually[4]. The Respondent bases its opposition to an award of compound interest on the ground that it was not awarded in the case involving *British Property in the Spanish Zone of Morocco*[5]. Although the arbitrator in that case did award simple interest, he went on to recognize that there are situations where compound interest is proper[1]. An award of compound interest is compelling in this case since Raytheon and Machlett have lost the use of their funds for nearly 20 years. If Raytheon and Machlett had not suffered the financial losses they did, these funds would either have generated additional earnings or would have been used to repay debt. These funds therefore would have generated either interest earnings or interest savings, which in turn would have been devoted to profitable use. Each year that compensation is not awarded to Raytheon and Machlett, the injury to them is in fact compounded. Thus, the actual loss to Raytheon and Machlett is most closely approximated by calculating interest at a commercial borrowing rate, compounded annually.

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[1] For a complete discussion of the award of interest, see Memorial, **I**, pp. 110-115.

[2] Counter-Memorial, *supra*, p. 49.

[3] *Ibid.*

[4] Memorial, **I**, pp. 114-115.

[5] 2 *Reports of International Arbitral Awards*, p. 650 (1924), cited in the Counter-Memorial, *supra*, p. 49.

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[1] Counter-Memorial, *supra*, p. 49. *See also Case of Antoine Fabiani*, summarized in M. Whiteman, *op. cit.*, at pp. 1785-1789; *American Independent Oil Co.* v. *The Government of the State of Kuwait*, 21 *International Legal Materials*, p. 976, at p. 1042 (1982).

SUBMISSIONS

Accordingly, the United States submits to the Court that it is entitled to a declaration and judgment that:

(a) the claims brought by the United States are admissible before the Court since all reasonable local remedies have been exhausted;

(b) Italy — by engaging in the acts and omissions described above and in the Memorial, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly owned Italian corporation ELSI and caused the latter's bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

- Article III (2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;
- Article (V) (1) and (3), in that Italy's actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;
- Article V (2), in that Italy's actions and omissions constituted a taking of Raytheon's and Machlett's interests in property without just compensation and due process of law;
- Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;
- Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(c) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(d) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above and in the Memorial.

18 March 1988.

(Signed) Abraham D. SOFAER,
Agent of the United States
of America.

(Signed) Arnold I. BURNS,
Deputy Attorney General,
Department of Justice.

ANNEXES TO THE REPLY OF THE UNITED STATES OF AMERICA

Annex 1

STATEMENT BY PROFESSOR FRANCO BONELLI, UNIVERSITY OF GENOA, DATED 2 MARCH 1988

My name is Franco Bonelli. I am an attorney and counselor at law duly admitted to practice in all courts in Italy. I graduated *magna cum laude* from the University of Genoa in 1960. I am the senior partner in Studio Legale Bonelli where I specialize in commercial law, particularly bankruptcy law. In my practice I have counselled numerous major private and public companies in bankruptcy law and bankruptcy proceedings. I have held the chair of commercial law at the University of Genoa since 1976 and was a visiting professor at Stanford University in the United States. I am the author of several legal publications on commercial law. I am the founder and editor of *Giurisprudenza Commerciale* and *Diritto del Commercio Internazionale*. I have been involved both as arbitrator and as advocate in various domestic arbitrations of commercial disputes and in international arbitrations under the rules of the Chamber of Commerce in Paris.

I have been asked to provide my opinion on whether Elettronica-Sicula, S.p.A. ("ELSI") was entitled in 1968 to proceed with an orderly liquidation under Italian law, whether ELSI was obligated to file a petition in bankruptcy prior to the requisition on 1 April 1968, and whether any delays in ELSI's bookkeeping in early 1968 due to earthquakes in Sicily or strikes at the plant violated Italian law.

The following opinion is based on my experience in Italian bankruptcy law and my review of the Memorial of the United States Government, the Counter-Memorial of the Government of Italy, and the accompanying annexes to each.

Entitlement to an Orderly Liquidation

1. A company is entitled under Article 2448, n. 5, of the Italian Civil Code to engage in an orderly liquidation of its assets upon a resolution of its shareholders to that effect.

   Raytheon and Machlett acted in accordance with this law when they voted on 28 March 1968 to liquidate the plant and assets of ELSI.

2. In Italy it is widely recognized that an orderly liquidation generates a more favorable return to the shareholders than does placing the company into bankruptcy.

   There are two principal reasons for this. First, a trustee in bankruptcy lacks the knowledge of the industry and marketing expertise to locate a buyer and execute the terms of the sale at the greatest return to the shareholders. Second, the trustee does not have the same monetary incentive to maximize the sales price as would the shareholders in an orderly liquidation.

3. In my experience it is common practice for larger bank creditors in Italy to settle claims for 40 or 50 per cent of value, rather than taking the risk of receiving little or nothing in the bankruptcy process.

No Obligation to File a Petition in Bankruptcy

4. Based on my review of ELSI's financial data attached to Annex 13 of the United States Memorial, it is my opinion that ELSI was under no obligation to file a petition in bankruptcy under Italian law. Under Italian law, ELSI would have been obligated to file a petition in bankruptcy only if its liabilities clearly exceeded its assets or if it was impossible for ELSI to fulfil regularly its financial obligations. At no time during its operations, as summarized in Attachment E1 to Annex 13 of the United States Memorial, did ELSI's liabilities exceed the book value of its assets. Moreover, as evidenced by the United States Memorial, ELSI consistently met and was in a position to meet all of its financial obligations.

I have no reason to believe the book value was incorrect since it appears from the United States Memorial that ELSI's balance sheets were audited by the company's auditors and by the accounting firm of Coopers and Lybrand. Therefore, if the book value had been higher than the actual value, the book value would have been diminished by virtue of Articles 2423 and 2425 of the Italian Civil Code.

No Jeopardy of Compulsory Dissolution

5. It is also my opinion that ELSI was never in jeopardy of compulsory dissolution. Under Article 2447 of the Italian Civil Code, ELSI would have been considered dissolved as a matter of law if its capital were depleted below a statutory minimum amount. At the relevant time the statutory minimum was 1,000,000 lire. Attachment B1 to Annex 13 of the United States Memorial demonstrates that ELSI's capital, even after taking into account losses, was always well above the statutory minimum.

Compliance with Article 2446

6. It is my opinion that ELSI was at all times in compliance with Article 2446 of the Italian Civil Code. When a company's losses exceed one-third of its capital, Article 2446 grants the shareholders of a company a one-year grace period from the date they knew or should have known of such losses either to reduce its capital or to take another appropriate action. As Annex 13, Attachment B1, demonstrates, at the fiscal year ending 30 September 1966, ELSI's capital was 4,000 million lire and its losses were 2,007.1 million lire. As the same Annex demonstrates, in 1967 the company devalued the capital stock to 1,500 million lire to reduce the company's losses and invested an additional 2,500 million lire to bring the company's capital back to 4,000 million lire. During the fiscal year ending 30 September 1967, however, ELSI's losses once again exceeded one-third of its capital. This time, the company did not adjust its capital and instead the shareholders voted to proceed with the orderly liquidation of ELSI's assets. This decision was taken within the one-year grace period authorized by Article 2446 and was in all respects in conformity with Italian law.

Delays in ELSI's Bookkeeping

7. Any delays in ELSI's bookkeeping in early 1968 that were due to earthquakes in Sicily or strikes at the plant were merely brief and unavoidable interruptions in ELSI's recordkeeping. In my opinion such delays do not violate Article 216 or 217 or the Italian Bankruptcy Act.

(*Signed*) Franco BONELLI,
Studio Legale Bonelli,
Genova.

Genoa, 2 March 1988.

DEPARTMENT OF STATE
DIVISION OF LANGUAGE SERVICES
(TRANSLATION)

LS NO. 125453
PH/
Italian.

[Title II

On Bankruptcy

Chapter I

On Declaring Bankruptcy]

5. *State of insolvency*. — The entrepreneur who finds himself in a state of insolvency is declared bankrupt.

The state of insolvency is manifested by defaults or other external facts which would demonstrate that the debtor is no longer in a position to satisfy his own obligations in a regular manner.

Annex 2

STATEMENT BY PROFESSOR ELIO FAZZALARI, UNIVERSITY OF ROME, DATED 29 FEBRUARY 1988

WRITTEN OPINION IN THE CASE CONCERNING ELETTRONICA SICULA S.P.A. BETWEEN UNITED STATES OF AMERICA AND ITALY

My name is Elio Fazzalari. I am an attorney at law practising in Italy and am qualified to appear before the Supreme Court of Cassazione. I have been appointed by the International Chamber of Commerce of Paris as chairman of several international arbitrations.

I graduated in 1944 from the law faculty of Rome University. I have been a professor of civil procedure since 1957. Since 1972, I have taught civil procedure at the Law Faculty of Rome University.

I am a member of the International Association for Comparative Law and a professor on the International Faculty of Comparative Law in Strasbourg.

I am the Director of the procedural law section of *Encyclopedia del Diritto*.

I am the author of several legal publications and treaties of civil procedure.

* * *

I was requested to provide my opinion as to whether Raytheon and Machlett exhausted all local remedies in Italy with respect to their claim before the International Court of Justice involving their subsidiary Elettronica-Sicula, S.p.A.

The following opinion is based on my knowledge of Italian civil law and my review of the Memorial of the United States and of the Government of Italy.

I

In its defence the State of Italy claims that, as a consequence of the execution order of the two treaties between Italy and the United States of America (treaties of 12 July 1949 and 1 September 1960, respectively), the Italian internal law has been integrated with the provisions of the said treaties and therefore Raytheon and Machlett should have and could have requested enforcement of these provisions in an Italian court. On the other hand, the Respondent does not specify which subjective position it assumes may have arisen in the Italian internal law nor which judicial remedies it assumes may belong to Raytheon and Machlett.

Thus, Article V of the treaty, providing an indemnification for an individual dispossessed of his own property, is not self-executing. In fact, in domestic law — to the structure of which it is necessary to make reference, and in our case to Italian law — an indemnification can be recognized either as "diritto soggettivo" (enforceable in an ordinary court) or as "interesse legittimo" (which is a different situation, enforceable in an administrative court): the provision of an indemnification obligation does not imply a determination of which of the two subjective positions an individual has been awarded, and such specific determination must be derived from other provisions of Italian law.

Also the provision of Article I of the Integrative Agreement is not a complete norm; in any case, a claim for damages in an Italian court is subject to the same specification as mentioned above with regard to Article III of the treaty: the

Italian legislator must further specify what kind of indemnification and/or compensation is provided and which court is competent to deal therewith.

Similarly, as Italy has not introduced in Italian law provisions affording United States citizens the additional protections of Articles III and VII, United States citizens in Italian courts may only assert the protection of Italian law as applied to all companies in Italy.

Any claim for the additional protections created by Articles III and VII — as well as those arising from Article I of supplementary agreement and Article V of the treaty — must therefore be raised by the United States at the international level.

II

Having excluded that the treaty has introduced into the internal law claims and judicial remedies stronger and different from those already available in the Italian legal system, we can only repeat that Raytheon and Machlett have exhausted all available remedies for the simple reason that there were no remedies available to them.

In fact, in case of an arbitrary requisition of the assets of a company, the shareholders do not have any claim against the requisition order, because such claim is reserved to the company (in the case in issue ELSI exercised the claim).

Similarly, an action for compensation by the authorities, as a consequence of a judicial declaration of the illegitimacy of the requisition, is reserved to the company which was the object of the requisition and not to its shareholders. And, in any case, if the company has become bankrupt, any judicial action is reserved to the receiver, while the shareholders become creditors of the bankruptcy (in the case in issue, the receiver of ELSI exercised all claims without success).

Rome, 29 February 1988 (*Signed*) Elio FAZZALARI.

Annex 3[1]

Letter from Professor Antonio La Pergola, Professor at the University of Bologna, to Raytheon Company, Dated 9 December 1971

[Italian text not reproduced]

(Translation)

PROF. ANTONIO LA PERGOLA, ATT'Y.
ORDINARIUS OF THE UNIVERSITY OF BOLOGNA

Bologna, 9 December 1971.

Raytheon Company
Lexington, Massachusetts 02173.

The question posed to me is whether (given all the happenings and circumstances surrounding Raytheon-El.Si. S.p.A. of Palermo and in the event that the United States Government intends to make a claim against the Italian Government for unlawful acts against the US national shareholders of the said company) the prerequisite of exhausting all available local remedies can be considered as fulfilled and an international claim advisable.

To respond to this query, I shall first have to look at the principles of international law to determine at what point an individual and, in particular, the shareholder of a commercial enterprise, can be legitimately backed by the country of which he is a citizen, in the case of injustice suffered in a foreign State. Only then can I proceed to examine whether in this particular case the essential elements for an international claim are given.

1. It is the common opinion of the scholars and of the judicial bodies that each country has the right to protect its citizens against injustice to which they may be subjected by foreign States. However, such protective action must be subject to the prerequisite that the individual has unsuccessfully exhausted the remedies effectively available under the constitution of the State in which the alleged injustice has occurred. Yet the meaning and the scope of application of the local redress rule would be misunderstood if one were to maintain that exhausting the available internal remedies constitutes the only condition that must be satisfied before international protective action can be taken. Whenever the country concerned takes steps to act on behalf of one of its citizens, it is in fact not enough that he has unsuccessfully tried to obtain compensation for damage or injustice suffered in the foreign State; the action taken must be based on a rightful claim that establishes the international responsibility of the foreign State. Therefore, in the case at hand, it would not suffice if the American citizens as shareholders of Raytheon-El.Si. S.p.A. only tried local remedies without at the same time making sure that the other conditions are met which are required by international law, so as to justify a possible claim against the Italian Government. It would be another matter if one intended not to file a claim or complaint, but, rather, to

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[1] By a letter of 27 May 1988 from the Deputy-Agent of the United States, this full translation of Professor Pergola's letter was submitted to supersede the partial translation originally submitted. *[Note by the Registry.]*

extend generic diplomatic protection to such subjects at the moment that the application of such broader rights of diplomatic protection — recently last discussed and redefined in the Vienna convention on diplomatic relations of 18 April 1961, but undoubtedly based on general international law — is cleared — with the only and obvious exception that not even generic diplomatic protection can be extended to subjects other than those connected with the State by virtue of citizenship — of the provision for the necessary requisites for proposing international action. These requisites are essentially as follows: *(a)* Citizenship of the individual concerned in the country filing the complaint (nationality of the claim). This is to be understood in the sense that the individual must have had that citizenship status from the time he sustained the damage or injury resulting from an unlawful act of a foreign State, without interruption up to the time at which the State to which he belongs has initiated the claim or fully up to the moment at which the claim is decided upon by the appropriate judicial agencies. Some also feel that parallel to this requirement there should be an effective "genuine link", not just an occasional or even involuntary connection, between the injured party and the State committing the injustice, which could be derived for instance from a contract or from residency in the said State. *(b)* Another requisite is that the State against which a claim is intended is charged with the perpetration of an international violation. This violation must consist in the failure to observe an international rule which binds the State concerned to a specific treatment of the citizens of the other country. In committing the violation, it does not matter whether the rule violated is one of common practice, i.e., consuetudinary rather than statutory in nature. It will doubtless be more difficult to prove the violation of a consuetudinary rule than that of a formal treaty, with the onus of proof being on the State filing the complaint. Proving a possible violation of a contractual rule is presumably facilitated by the existence of a written text on which the court can rely in determining at which point the violation took place, while there is no unanimity on the tenor of the consuetudinary standards to which the State is bound in assuring the rights of foreigners, if one leaves the obligation to adapt the administration and operation of jurisdiction to a minimum level of impartiality and of procedural guarantees out of consideration.

It is immaterial at this point to consider other problematic aspects of the definition of an international violation. I shall limit myself to the observation that doctrine and jurisprudence are in agreement to the effect that a violation fundamentally committed against an individual must be considered as an unlawful act against the State to which the individual belongs (*Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2*). This is a definite point in the law governing claims which cannot be disputed, being based on the premise, under peacetime conditions, that the individual is not an international entity. It follows from this premise that the infraction of an international rule which binds the State to a certain behaviour toward the foreigner constitutes a violation of the rights of the country of which the foreigner is a citizen; that is, of the right to demand that the rule be observed or, in fact, the right to diplomatic protection which each State possesses on behalf of its subjects. It is, therefore, certain that the international complaint is indicated, whether the violation consisted in an act of injustice against the private individual or whether it constitutes a direct violation of the rights of the State filing the complaint, quite apart from any particular behaviour which the perpetrator of the violation may have shown toward citizens of that State. This still does not preclude, when the State takes steps to provide protection of its citizen, the subjection of the claim to certain conditions which, logically, cannot apply in the case where the complaining State claims to have been the direct victim of the violation. These are exactly the prerequisites for a complaint as I have stated them above, with that of attempted internal remedy being of first priority. It has, in fact, been stated that the remedies in question must have been exhausted by the foreign individual, so long as these are effective remedies which serve to obtain indemnification for the damage and injury sustained, for which purpose it can be assumed that the subject has been required or prepared to submit to the jurisdiction of the territorial State authorities to which extent foreign sovereignty cannot be considered: *Par in parem non habet jurisdictionem.* To this must be added that the proposition of a complaint regarding an injustice suffered by the individual cannot in any way prescind from a substantiation of the damage or injury sustained by the individual protected. It follows that this form of violation is distinguished from that of direct injury committed against the sovereign State, which latter is solely determined by whether there is a threat or agitation aimed at violation of the interests or rights of a State. Therefore, to clearly determine the damage or injury caused by the injustice, one must take into consideration the substance of that particular international rule the violation of which is alleged by the complaining State; the complaint must also indicate in what form, acceptable under international law, the damage and injury claimed by the individual should be remedied.

If one maintains that the requirement of damage and injury to the private subject can be set aside, one would also have to negate any basis for the entire system of rules which govern the initiation of international claims; in fact, the requirement of "nationality of the claim" is based on the concept according to which any violation of the sphere of interest of the individual is tantamount to a violation of the sphere of interest of the State. The very rule which requires the exhaustion of internal domestic remedies presupposes that the individual has sustained a damage which has arisen to him from the violation of a privileged juridical position to which he should be entitled by virtue of the constitution of the territorial State and which damage can be remedied, in accordance with the provisions of such constitution, without delay or denial of justice which, from the perspective of international law, would constitute a form of unlawful act by itself.

2. This is the essential framework of the principles within which the investigation of the specific case in question must be conducted.

It is now necessary to point out how, in applying these principles, one can put into proper perspective the circumstance that the individual on whose behalf the complaint is contemplated, is the shareholder of an Italian company. This element of the case in point can give rise to some doubt relative to the validity of the claim. The scholars and arbitral colleagues are in fact still debating the question of whether protection of the shareholders of a commercial company should be precluded considering the fact that individuals are involved who are organized in juridical entities which, according to most State constitutions, have their own particular personality and nationality, with the result that the shareholders may be citizens of various countries and that one can attribute to the corporation the nationality of a country other than the States to which the shareholders belong. To accept international protection of the shareholder without reservation would therefore involve a lifting of the mantle of personality of the company. This has in fact been advocated before at the Permanent Court at The Hague by an expert Italian jurist, Scialoia, who observed, in the *Canevaro* case, that the right of the Italian Government to protect its own citizens is neither limited nor eliminated by the foreign character of a company, because "if the rights of the company as a legal person are distinguished from those of the shareholders, then they serve in effect only the interests of the business partners". Others point out, however, that the international protection afforded the individual partner or shareholder can engender serious drawbacks and especially conflicts which may eventually involve different States, each providing international protection for its own citizens who are all shareholders of the same company. The State charged with the unlawful act would in such a case find itself facing as many individual cases as there are countries initiating claims. If the shareholders of the foreign company, on their part, are not individuals but corporations, perhaps even of different nationalities, it could well be that they act together and that cumulative claims are initiated, all against the same State, respectively on behalf of the company in question and of the individual shareholders. In view of such prospects, arbitral jurisprudence has had to proceed with great circumspection, largely guided by considerations of equity, to find the right point of reconciliation between the necessity of not unduly compromising the right of diplomatic protection of each State on the one hand and, on the other hand, the need to avoid a dilatation, beyond reasonable limits, of the international responsibility of the States in which operate commercial corporations constituted of individuals of diverse citizenship.

In a timely comment, Judge Bagge, arbiter in a few prominent controversies connected with the protection of shareholders, writes on this subject that the rules of intervention are semijuridical and semipolitical in nature, portending that they will not be applied along criteria rigorous and inflexible enough to prejudice good relations between the sovereign States but rather in a way as to enhance these relations. However, the jurisprudential precedents which to me seem relevant are few in number and relate predominantly to claims of the United States and Great Britain. These two countries have in fact found it necessary to protect, with a certain frequency, the property interests of their citizens abroad, and in particular those of shareholders. Protection has been exercised at an earlier time through the interposition of good offices and without official intervention, and from the *Delagoa Bay* case (1889) (in Moore, *Digest of International Law*, 1906, Vol. VI) with the institution of formal claims. I feel I can determine from the decision in that case and from subsequent jurisprudential findings several most essential principles which, as I see them, are today commonly accepted and which in all cases appear to me to be the most appropriate ones for the requirements of *juris aequi* from which the right of international claims cannot diverge, especially in this delicate area.

(a) The company, as an entity distinct from individual partners or shareholders, must have the nationality of the State against which the claim is directed. This serves to preclude that the company as such can be protected by the State intervening for the protection of the shareholders, so that the latter, if deprived of the assistance of the State of which they are citizens, would be stripped of any possible international protection (*Delagoa Bay* case, cited; *Tlahualilo* case, in Hackworth, *Digest of International Law*, Vol. V, 1943).

(b) The company must be defunct or in the state of liquidation or bankruptcy and such situation must be understood to be ascribable to an international violation (*Baasch and Roner Kunhardt* case in Ralstin, *Venezuelan Arbitrations of 1903* (1904); *El Triunfo* case, in Moore, *Digest of International Law* (1906), Vol. VI; *Romano-Americana* case, in Hackworth, *Digest*, cited).

The reason for this requirement is twofold. First of all, the company must be unable to claim injury of its own rights by the territorial State in any way other than through a liquidator or receiver, and that, consequently, the individual shareholders find themselves unable to assure normal functioning of corporate offices for protection in the case of any possible violation of their rights which may indirectly result from any damage inflicted on the company. Therefore, in this case as well, international tutelage and diplomatic protection are the only possible ways to safeguard the rights of the shareholder and to obtain indemnification for the damage sustained by him. One must further consider that, given that the company is dissolved or defunct or in a state equivalent to dissolution or extinction, the right of the shareholders to simply partake of the profits of the company ceases to exist and is replaced by the right to a distribution share in any assets consisting of the company's remaining net value. Even in the application of these principles on the part of international jurisprudence, one is debating which rights can be immediately and directly considered as far as the shareholders themselves are concerned; while it is ruled out that the category of subjective positions on the part of the shareholders includes the standard or inherent rights conferred on the shareholders governing the organization of the company or a right to remedy for mismanagement, the right to obtain a quota proportional to the equity in the company in the case of liquidation constitutes — according to the most national juridical statutes — a direct proprietary right or one directly pertaining to the shareholder as an individual;

(c) Provided that one can establish that, with the company ceasing regular operation, the shareholder has suffered damages resulting from a violation of the rights attributed to him, the State of which the shareholder is a citizen can lodge a complaint against the State responsible for the violation.

If all of the elements indicated by me appear in the case in point, then direct protection of the shareholder is to be considered admissible, without regard to the existence of the company as an independent subject with its own rights. It follows — and this is a rather important consequence — that the claim is not subject to prior exhaustion of internal remedies since the shareholder, in his capacity as such, has no remedy to pursue within the territorial State to obtain indemnification for the damages suffered by him. For the purpose of admissibility of the international claim, a case in which no effective remedies exist is in fact equivalent to one in which the available remedies have been unsuccessfully exhausted.

The preceding considerations permit sufficiently precise consideration of the aspects relevant to the solution of the questions posed to me in the case here at hand.

Indeed, keeping in mind what I have already had the opportunity to observe with regard to the first requirement for the initiation of a claim on the part of the State to which the shareholders belong — the perpetration of an international violation — reference can be made to the provisions of Article 1 of the supplementary agreement, worked out in Washington on 26 September 1951, to the treaty on commerce and navigation of 2 February 1948, and in particular to the clause relating to the illicit character of any arbitrary or discriminatory measure resulting in an obstruction of the effective control and administration of enterprises founded or acquired by citizens or juridical persons of one of the opposing parties, or in prejudice to their rights and interests relative to business enterprises and investments (including in particular shareholdings). The international obligation of the opposing parties to refrain from discriminatory or arbitrary measures against citizens of the other State is also designed to provide a possibility for securing, under normal conditions, capital and other special goods required for the economic development of ventures derived from investments by citizens of the two countries, besides obtaining the benefit of special assistance in fiscal, customs and tariff matters (in which connection reference is made to Article 5 of the said agreement, with specific regard to the provisions established by the Italian legislation, effective as of the time the Treaty or supplements thereto went into effect) offered for investments for the purpose of the industrialization of the Mezzogiorno (Southern Italy).

With the international rules thus established against which the conduct of the Italian Government must be measured for determining the possible existence of an international violation — and I personally do not consider it possible nor practical to refer, for this purpose, to any other norm, consuetudinary or contractual — the problem faced is that of ascertaining whether the factual situation presented to me by Raytheon Company clearly contains the elements necessary for the conclusion that the obligations arising from the said norm have been violated.

Within the framework of the actions directly or indirectly attributable to the Italian Government, of the formal steps taken, and of all the other circumstances which have brought about the state of extreme hardship in which the American shareholders of Raytheon-El.Si. S.p.A. have come to find themselves, one fact emerges clearly and merits special attention. As a consequence of all the events which have resulted from various corporate actions and which are also described in the report submitted to the appropriate Judge by the bankruptcy liquidator of Raytheon-El.Si. S.p.A. on 28 October 1968, Raytheon El.Si. S.p.A. — after the shareholders had an opportunity for various recoveries either through the conferment of large sums of risk capital or through direct financing or financing guaranteed by them to the company, in view of the losses incurred due to the plant's location — was forced to adopt a program of reorganization of its productive structure which then yielded favourable results and in turn helped to reduce the administrative losses.

This program — designed to assure, through increased productivity of the plant, greater competitiveness of its products — entailed sacrifices for part of the labour force employed, sacrifices which, of course, did not meet with favourable reception on the part of the unions.

Other difficulties, stemming from the situation concerning certain product lines of the operation, prompted the management of Raytheon-El.Si. S.p.A. to decide on the cessation of the industrial activities and, later, of the commercial activities, and to propose to the shareholders the liquidation of the company for the purpose of an orderly and well-planned sale of the company in its entirety. As a result of this decision of the corporate management which was made public, the Mayor of Palermo, in his capacity of a government official, and with the tacit approval of the Central Government per provision of 1 April 1968, ordered the requisitioning of the plant and of all its equipment for a duration of 6 months, successively extended.

Raytheon-El.Si. S.p.A. promptly reacted to this measure through the means available under the Italian constitution. Meanwhile, however, being deprived of the availability of all the material constituting its assets, the company was irremediably obstructed and prejudiced in the planned orderly liquidation of the operation. As a result, with substantial debts falling due which the company was unable to pay for want of liquidity thus brought about, it was forced to file for a declaration of bankruptcy. The bankruptcy was declared by verdict 7 of 16 May 1968.

That the requisition order was illegal has been recognized by the Prefect of Palermo in the execution of his controlling powers over the actions of the Mayor as a government official. The Prefect has confirmed that the situation of financial difficulty which was followed by the declaration of bankruptcy of the company, is a direct result of the fact that the firm was deprived of the availability of the property through the intervention of the government authority.

However, as a matter of interest, it does not seem necessary to determine whether the Mayor's action was unlawful since on the basis of the Italian constitution this is a question which at this point concerns the bankruptcy office (given the fact that in Italy it is exclusively within the power of the liquidator of the bankrupt company to support or resist any legal action on the basis of which it is possible to definitively establish the contrariety of this action violates the standards of internal law).

On the premise that the company is at this point deprived of any possibility to take action for the protection of the rights which are specifically due to them due to the state of bankruptcy in which it finds itself, it is now a matter of determining whether the shareholders have suffered any violation of their rights as a result of the conduct of the Italian State that may have been contrary to the obligations internationally accepted by Italy according to the specific provisions of the friendship treaty. There seems to be no doubt that the action by the Mayor of Palermo interfered first of all with the implementation and materialization of the liquidation of the business operation of Raytheon-El.Si. S.p.A. after the completion of which it would have been possible to determine whether the shareholders after payment of the corporate debt, would have been able to obtain reimbursement, in full or in part, of the respective amounts paid by them and possibly the allocation of a quota — proportional to their investments out of the residual net assets of the company.

Aside from the direct causal connection existing between the requisition and the state of payment difficulties, culminating in the bankruptcy of the company (at the expense of the corporate creditors in whose collective and objective interest the receiver is empowered to take the most opportune remedial steps), the conduct of the Italian State agency has directly and definitively obstructed any possibility to provide for the liquidation of the corporate assets by a sale, under terms acceptable to the company, of the property requisitioned, as well as by any suitable agreement the company could have worked out with the corporate creditors with whom, in fact, it had already arrived at preliminary agreements, and which would also have left open the possibility of recovering, if only in part, the large amounts which the shareholders had committed to the business.

Now, the act of making it impossible to liquidate the company and to conduct the activities which normally lead to the sale of corporate property, has directly cut into the clear and specific rights of the shareholders. Therefore, the conduct of the Italian State which has brought about this prejudicial situation vis-à-vis the rights and interests of the American shareholders and the negative impact on their investments in the form of stock participation, is certainly contrary not only to the express provisions of the above-mentioned international rule but also to the very raison d'être of the latter which is designed to assure an obligation to the effective and efficacious recognition of the need to safeguard such rights and interests. The conduct of the State assumes in fact an arbitrary and discriminatory character in relation to all the principles of international law, and most of all to the principle of good faith, which offer us a constant interpretative criterion for treaties. It is clear that the terms arbitrary and discriminatory, used in the Treaty, need not clash with the notion of illicitness — especially if that is related to the significance commonly attributed to it in the jurisprudence of State constitutions — in the sense that arbitrary or even discriminatory can refer to a conduct which is not formally illicit but still contrary to international rules. At the border line there may be an act or conduct on the part of the State devoid of any form of control or accountability, taking place within the parameters of internal law, where one can correctly define as arbitrary a given measure alone for the fact that it exceeds the limits of most essential reasonableness and good faith (which are the purpose of the treaty) even though there is not technically an abuse or excess in the exercise of the largely discretionary powers of the public agency. This definition is particularly indicated in that, in the case at hand, the arbitrary nature of the measure taken by the Mayor of Palermo as a government official is only the most obvious aspect of the picture in which are contained many other facts directly or indirectly chargeable to the Italian State. These facts which, even taken individually, are undoubtedly symptomatic of a tendency to treat the American shareholders of Raytheon El.Si. S.p.A. if not in a hostile, but certainly not a favourable, manner, and in their sum total they assume clear relevance for the purpose of expressing a judgment on the contrariety of the Italian conduct relative to the obligations under the Treaty. Among the facts brought to my attention are the following:

Massive intervention by the President of the Region (of Sicily) prior to the declaration of bankruptcy of the company, openly aimed at obstructing the liquidation plan worked out by the company; the great publicity given by the Italian Government, via radio and television, to the intention of a company of the State-controlled IRI group to proceed with the takeover of the plant, with the effect of discouraging any potential private buyer and of making impossible the sale which later took place at a price substantially below the estimated value; the behaviour of the IRI credit banks towards the American shareholders in pursuing drastic legal action in the Italian courts for the purpose of creating an onerous situation for them.

Based on all these elements I believe that one may be justifiably convinced of the arbitrary nature of the Italian Government's conduct, consequently constituting an international violation.

As I have stated earlier, that it is necessary for making the initiation of a claim legitimate to also meet other requirements, but in our case one cannot really doubt that these are met. The fact is that the shareholders are American nationals which satisfies the requirement of the nationality of the claim. They have further established, through their interest and investments in an Italian corporation, a genuine link with the territorial State.

On the other hand, the company is undoubtedly of Italian nationality. Since the company belongs to the country which committed the violation, another one of the elements is given in that the individual shareholder can be protected by the country of which he is a citizen. The company is furthermore in a state of bankruptcy which is, *inter alia*, a direct result of the requisition order. The bankruptcy status prevents any direct initiative by the company to put itself back into the situation in which it would have found itself had it not been for the illicit action. On the basis of the principles confirmed by international jurisprudence, this constitutes another element permitting immediate protection of the shareholders by the State of which they are citizens. Hence, the question of exhausting internal remedies does not apply since these remedies, in this situation, would not have been directly available to the shareholders. The latter have suffered a specific injury of their interests since the illegal conduct of the State made the liquidation impossible. Such conduct is by itself abstractly apt to cause damage or injury, even if concrete quantification of such damage is an argumentative point not part of the problem posed to me.

For the reasons developed above, I feel that I have to conclude that in the situation at hand all the requirements appear to be satisfied for international protection of the shareholders of the Raytheon-El.Si. S.p.A. who are United States citizens, without the need to pursue internal remedies prior to the possible initiation of a claim against the Italian Government.

(Signed) Prof. Antonio La Pergola,
LL.M. (Harvard).

Annex 4

LETTER FROM AVV. GIUSEPPE BISCONTI, STUDIO LEGALE BISCONTI, ROME, TO RAYTHEON COMPANY, DATED 6 NOVEMBER 1971

6 November 1971.

Gentlemen,

You have requested an opinion as to what remedies are available under Italian law to the shareholders of Raytheon ELSI S.p.A. (hereinafter referred to as "ELSI") in relation to the damages suffered by said shareholders as a consequence of the requisition by the Mayor of Palermo of ELSI's assets on 2 April 1968 and of subsequent events.

I have acted as Italian counsel to Raytheon Company, a shareholder in ELSI, in relation to various matters since 1962. I have also acted as Italian counsel to Raytheon Company in relation to ELSI matters continuously since March 1968. As such counsel, I am fully familiar with the events concerning ELSI that occurred since the resolution of ELSI's Board of Directors of 16 March 1968 to cease production and undertake an orderly liquidation of ELSI and specifically with the events represented by the aforementioned requisition, the subsequent action by the Italian Government, the bankruptcy of ELSI and its developments to date and the pending litigation instituted by the Italian creditor banks against Raytheon Company. Under Italian law the following remedies are available:

1. Remedies against the requisition. The Mayor of Palermo in making the requisition acted as an official of the National Government. Under Italian law, an appeal against the requisition order can be taken to the Prefect. Such appeal was promptly taken by ELSI. As an effect of the bankruptcy of ELSI which occurred subsequent to and as a consequence of the requisition of ELSI's assets by the Mayor, the right to pursue the appeal vested solely in the curator of ELSI's bankruptcy. The remedy as such was a remedy available to ELSI as a company and prior to the bankruptcy there was under Italian law no remedy available to the shareholders of ELSI. The requisition was made by the Mayor acting as an official of the National Government and there is no remedy under Italian law against the National Government other than the aforementioned appeal.

2. Under Italian law as an effect of the bankruptcy ELSI and its management were deprived of the right to take any action in ELSI's name and such right has vested in the curator. Under Italian law the curator exercises any such rights in the interests of ELSI's creditors and not of the shareholders. Subsequent to the bankruptcy of the company, there is no possibility under Italian law for the company itself nor for the shareholders to exercise any rights or action which the company might have had prior to the bankruptcy. Following the decision by the Prefect of Palermo of 22 August 1969 which ruled that the requisition by the Mayor was illegal, the curator of ELSI brought suit against the Italian Government and the Mayor of Palermo to recover damages on behalf of ELSI's creditors. No such action would be available under Italian law to ELSI's shareholders.

3. As stated above, the shareholders of ELSI have no direct action against the Italian Government under Italian law in relation to the damages suffered by them as a consequence of the requisition and subsequent events. In my opinion, the

shareholders would not have a cause of action even under Article 2043 of the Italian Civil Code, because: *(a)* the requisition was directed against ELSI and not the shareholders even though the latter eventually suffered damages; and *(b)* Italian law provides for a specific remedy against the requisition which is the aforementioned appeal to the Prefect. I know of no judicial decision in which Article 2043 of the Italian Civil Code was applied in similar circumstances. It is my opinion that the shareholders of ELSI would have no remedy or no effective remedy under Article 2043 of the Italian Civil Code.

4. By way of conclusion, there is no remedy under Italian law available to the shareholders of ELSI in relation to the damage suffered by them as a consequence of the requisition by the Mayor of Palermo and the subsequent events. In my opinion there can be no question as to whether the shareholders have exhausted all (nonexistent) local remedies.

(Signed) Avv. Giuseppe BISCONTI.

Annex 5

ELSI — ELETTRONICA SICULA S.P.A. BY-LAWS (ARTICLES OF INCORPORATION) APPROVED BY THE SHAREHOLDERS' EXTRAORDINARY MEETING OF 19 JULY 1961

[Not reproduced]

REJOINDER OF ITALY

DUPLIQUE DE L'ITALIE

INTRODUCTION

1. The Admissibility of the Application and the Applicant's Allegations on the Merits: Some Introductory Remarks

First of all, the Italian Government reiterates its objection to the admissibility of the application for the reasons set forth in Part III of the Counter-Memorial[1] and further developed in Part III of this Rejoinder.

With regard to the facts, it may be useful to summarize at the outset the contentions made in the Applicant's Reply, which contains several discrepancies with respect to the Memorial.

The unlawful behaviour attributed by the Applicant to the Italian Government allegedly consists of four well-defined acts or omissions, namely: the requisition of the ELSI plant by decree of the Mayor of Palermo acting in his capacity of government official; the Prefect's delay in rendering a decision on the appeal; the failure of public authorities to protect ELSI's property from the factory workers' occupation; the interference in the bankruptcy proceedings in order to discourage private purchasers and allow IRI to buy up the plant at a price well below its fair market value[2].

All the above-mentioned behaviour is alleged to be the result of a diabolical plot hatched by the Italian public authorities at many different levels (Central Government, or at least several ministries, regional and local officials, State-owned companies, bankruptcy institutions, etc.) all done to take over a "technological jewel", i.e., ELSI, on the cheap.

This plot allegedly led to the bankruptcy of ELSI, which would otherwise have been wound up in an "orderly liquidation". It also meant that in the bankruptcy proceedings the realized value of the company's assets was much smaller than their true value so that Raytheon and Machlett suffered damage to the extent of the difference between the actual amount received and what would have been obtained if ELSI had been sold as a "going concern", or at least on the base of its quick-sale value, in the frame of an orderly liquidation[1]. To be added to this are the legal costs incurred and the compound interest on both items.

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[1] Counter-Memorial submitted by Italy (Case concerning Elettronica Sicula S.p.A. (ELSI)), hereinafter referred to as "the Counter-Memorial".

[2] The Memorial submitted by the United States of America (case concerning Elettronica Sicula S.p.A. (ELSI)) (hereinafter referred to as "Memorial") also contained (I, pp. 65-66, especially at p. 66, note 1) a further accusation against the Italian authorities: publicly owned banks claimed that Raytheon, as "dominant partner", should pay ELSI's unsecured debts.

This reference has been dropped in the Reply submitted by the United States of America on 18 March 1988 (hereinafter referred to as "Reply") (see p. 365, *supra*) and it should be acknowledged that the Applicant no longer intends to pursue a claim on such point and the arguments supporting it. United States Government counsel has apparently realized that it would be absolutely untenable and contradictory to claim that the publicly owned Italian banks would go against their own interests and ruin someone who owed them money, thus losing all their unsecured loans. As chance would have it, the loss incurred by the banks would have been equivalent in economic terms (about 4,000 million) to the profit made by IRI according to the charges made by the Applicant (Memorial, Ann. 13, Sched. E).

As set out above, according to the United States Government the facts represent a series of violations of the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy and of the 1951 Supplementary Agreement and thereby give the United States Government title to reparation of the losses allegedly incurred.

2. The Facts Represented by the Respondent

The Respondent has done more than merely indicate the gaps and inconsistencies in the version of the facts presented by the Applicant and its patently tendentious nature. The Italian Government has also attempted to clarify the order in which the facts actually took place.

For instance, with regard to the requisition decree, the Respondent illustrated its legal basis under Italian law and pointed out that its aim was not to deprive ELSI of the ownership of its plant but merely to regulate the use of the plant for a period of six months[2]. As far as the "orderly liquidation" is concerned, an outline has been given of the content of the decision taken by the ELSI board of directors on 16 March 1968 (i.e., two weeks before the actual requisition)[3], and confirmed by the shareholders' meeting of 28 March[4], i.e., immediate cessation of production, of all commercial activities and of employment relations as from 29 March[5]. Moreover, the Counter-Memorial examined expectable results of an "orderly liquidation" taking into account the precarious economic and technical conditions of ELSI[6]. Precise figures have been given to show how the chance of avoiding bankruptcy implied the need to get the banks to which ELSI owed money to accept the recovery of only 50 per cent of their credits[7]. Therefore, the fact that ELSI filed a petition for bankruptcy on 26 April 1968 was an inevitable consequence of its state of insolvency and not of the requisition decree. This was attested by the Palermo Court of Appeal in its decision of 23 November 1973[8].

With reference to the alleged manipulation of the bankruptcy procedure by the Respondent, it has been pointed out that, in Italy, this type of proceeding is carried out by a receiver appointed by the Court, who acts in co-operation with the presiding bankruptcy judge and also consults a committee composed of the creditors. All this contributes to ensuring that the proceeding is objective. Furthermore, the Counter-Memorial also analysed the way in which the bankruptcy auctions were organized and the prices fixed for the sale of the plant and equipment[1]. The conclusion was reached that the price paid by the purchaser was quite reasonable[2], even when compared with the estimated quick-sale value stated in the 1974 Claim by the Raytheon and Machlett Companies.

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[1] The quantification of the alleged damage has increased with time. While the Claim of the Raytheon Company and Machlett Laboratories, incorporated against the Government of Italy in connection with Raytheon-ELSI S.p.A. (hereinafter referred to as the "1974 Claim"), contained in Counter-Memorial, Unnumbered Documents, Vols. I, II, III, refers exclusively to the quick-sale value, and the Memorial to the book value and, in the second instance, to the quick-sale value, in the Reply the Applicant mentions a higher value, justifying the increase by the profits a "going-concern" would expect to make. These ever-increasing contentions ring particularly strange with reference to a company whose history is marked solely by losses growing from year to year.

[2] Counter-Memorial, p. 11, *supra*.

[3] Memorial, Ann. 31.

[4] *Ibid.*, Ann. 32.

[5] Counter-Memorial, p. 9, *supra*.

[6] *Ibid.*, pp. 4 ff. and 6 ff., *supra*.

[7] *Ibid.*, pp. 10-11, *supra*.

[8] Memorial, Ann. 81; see also Counter-Memorial, p. 16, *supra*.

As to the occupation of the factory by the striking work force, it has been pointed out that it began in early March 1968, when the plant was under exclusive ELSI control, and not after the requisition. Moreover, the occupation did not prevent the winding-up operations from being carried out regularly[3].

As to the delay with which the Prefect of Palermo rendered the decision upholding the ELSI appeal against the requisition decree (22 August 1969), documentary evidence has been produced to show that the average length of such procedures is 12 months, which is not substantially less than the time actually taken in that case (16 months). It has also been pointed out that each petitioner has the right to make a special request that the decision concerning him be expedited. In the ELSI case, this was done only on 9 July 1969[4].

One further aspect has been stressed: starting from 30 September 1968 (i.e., from the day on which the requisition decree expired), ELSI lost control of the factory, as a result not of the requisition decree, but of bankruptcy The delay in the Prefect's decision was therefore not detrimental in any way. Lastly, with regard to the Applicant's assertion that no adequate compensation was paid, it has been responded that, although the decree of the Mayor of Palermo acknowledged ELSI's right to such compensation, the actual payment of compensation was postponed pending the appeal to the Prefect of Palermo, and then the upholding of the appeal implied that the right to such compensation was replaced by the right to compensation for damages caused by the requisition. To this effect a sum of money was awarded by the Court of Appeal of Palermo in its decision of 23 November 1973, which was confirmed by the Court of Cassation on 26 April 1976[5]. The sum was actually paid to the receiver in the ELSI bankruptcy proceeding. Therefore, in the final analysis, it has to be acknowledged that the Respondent fulfilled its obligation to compensate the damage caused by the requisition of the ELSI plant.

3. The Applicant's Failure to Provide Evidence to Justify Its Claims

The Applicant and the Respondent have thus given the Court two widely differing versions of the facts relating to the present case. This means that the dispute between them concerns not only the different interpretation of Treaty provisions but, to an even greater extent, the different statement of the facts to which those legal provisions are to be applied. However, the comparison between the two versions in question cannot be based on the assumption that they have equal weight, and that the Court is called upon simply to establish which of the two parties can prove its arguments more fully and convincingly. This is not the case, because the Applicant, who claims to have been unfairly treated and therefore requests a reparation from the Respondent, must demonstrate that the facts on which its claims are based are true.

We know that, in international cases, it is very often impossible to identify an Applicant and a Respondent since the parties may have concluded a special arbitration agreement. Therefore, it is generally held that the problem of the burden of proof to be shared by the parties cannot be resolved in the same terms as in a case heard before a national court. Nevertheless, it is to be pointed out that, in the present case, which has been brought before the International Court of Justice by a unilateral application, there is an Applicant and there is a Respondent. And as it is true that the Applicant has put forward certain claims, it is equally true that it must prove them.

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[1] Counter-Memorial, pp. 18-19, *supra*.

[2] *Ibid.*, p. 20, *supra*.

[3] *Ibid.*, p. 15, *supra*.

[4] *Ibid.*, p. 17, *supra*.

[5] The English text of these decisions can be found in Memorial, Anns. 81 and 82.

It is interesting to note in this respect that when the Court has had to deal with a question involving the burden of proof, e.g., the *Corfu Channel* case — a case centred around an unlawful act committed in the territory of the Respondent (Albania) — the Court ruled that the sole fact that this State exerted control over its own territory did not mean that it was obliged to have a knowledge of all unlawful acts committed in such territory[1]. The judgment declared that the fact of controlling the territory *per se* "neither involves *prima facie* responsibility nor shifts the *burden of proof*" (logically, in the sense of freeing the Applicant from this burden). It is likewise significant that, in an order on the *Minquiers and Ecrehos* case, the Court, after considering the position of the two Parties (who were both claiming sovereignty over the same territory), and taking into account two articles of the special agreement concluded by them, stated that "each Party has to prove its alleged title *and the facts upon which it relies*"[2].

Lastly, it should also be noted that in its judgment of 27 June 1986 in the case between Nicaragua and the United States concerning *Military and Paramilitary Activities in and against Nicaragua*[3] the Court considered, among other points, Article 53 of its Statute with respect to the situation in which one of the parties does not appear and the other party requests its claims to be satisfied[4]. On that occasion the Court stated that

> "the Court must attain the same degree of certainty as in any other case that the claim of the Party appearing is sound in law and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence[5]".

Later in the same decision the Court stated that "it is of course for the Party appearing to prove the allegations it makes[6]".

In conclusion, therefore, even though both Parties are called upon to prove their respective claims in an international proceeding, it seems unchallengeable that in a suit in which the Applicant complains of being the victim of unlawful acts, of which it accuses the Respondent and for which it requests reparation, while the Respondent denies any breach of its obligations and merely requests that the application should be rejected, it is up to the Applicant to provide evidence to justify its claims.

4. In Particular, the Lack of Evidence concerning the Causal Link Between the Alleged Acts and the Alleged Losses

The nature of the present dispute leads to another important consequence concerning the evidence that the Applicant is obliged to provide. As was said, a series of events involving ELSI occurred in the years 1968 and 1969 for which, according to the Applicant, the Italian Government is responsible. However, although these facts have a chronological sequence, it still has to be proved —

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[1] *I.C.J. Reports 1948*, p. 18.

[2] *I.C.J. Reports 1953*, p. 52.

[3] *I.C.J. Reports 1986*, pp. 14 ff.

[4] *I.C.J. Reports 1986*, p. 24, para. 18.

[5] *Ibid.*, para. 29.

[6] *Ibid.*, para. 30.

and this proof is necessary — that there is a causal link between them: in other words, it still has to be proved that there is any cause-and-effect relationship between them.

In particular, it must be pointed out that the most important circumstances giving rise to damage the Applicant has complained of were a direct consequence of the bankruptcy: the non-availability of the ELSI factory and plant after the requisition period (i.e., after 30 September 1968), the compulsory liquidation of the company's assets and the sale of the plant to the ELTEL company. It is a well-known fact that the bankruptcy proceeding was requested by ELSI. Therefore, the Applicant could attribute the above-mentioned circumstances to the Italian Government only by asserting that the filing for bankruptcy was caused by the requisition. However, this assumption must be supported by evidence, which has not been forthcoming. On the other hand, the Respondent's evidence to the contrary is substantial.

With reference to the general problem of the role of causation in the field of State responsibility, it is interesting to recall the principles adopted in the draft Convention on the international responsibility of States for injuries to aliens, established by the Harvard Law School in 1961[1]. Article 1, paragraph 1, of the draft stated the following principle: "A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes injury to an alien." In Article 14, paragraph 3, the concept of causation was defined in the following terms: "An injury is 'caused' . . . by an act or omission if the loss or detriment suffered by the injured alien is the direct consequence of that act or omission." Paragraph 4 added:

> "An injury is not 'caused' by an act or omission: *(a)* if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien, or: *(b)* if, in the case of act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk."

The restriction of indemnifiable damages to those which are the direct consequence of the wrongful act of a State coincides with the prevailing jurisprudence of international arbitration tribunals. This point will be further elaborated upon when we come to deal with the claim for damages presented by the Applicant. For the time being only two observations will be made: the only direct consequence of the requisition decree of the ELSI plant issued by the Mayor of Palermo on 1 April 1968 was its temporary unavailability to the company to which it belonged. For this reason, the damages granted by the Court of Appeal of Palermo (decision later upheld by the Court of Cassation) were limited to the consequences of this unavailability by its owner calculated as the equivalent of 5 per cent of the value of the requisition assets. As to the greater losses for which the Applicant is claiming compensation, they actually result from the bankruptcy for which ELSI itself filed a petition. They are only indirectly related to the requisition even if one accepted the Applicant's arguments that the unavailability of the plant was the cause of the insolvency (which is clearly disproved by the fact that ELSI had ceased all commercial activities as a result of the decision of 16 March 1968 of its Board of Directors). The truth is that there is absolutely no relation between the requisition decree and the fact that the company was liquidated for bankruptcy.

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[1] *American Journal of International Law*, Vol. 55, 1961, pp. 548 ff.

5. The Question of Attribution of the Alleged Acts to the Italian State

One further remark must be made concerning the way the Applicant has presented the facts concerning this case. We have already pointed out that, in the draft Convention on the responsibility of States for injuries to aliens, established by the Harvard Law School in 1961, one of the prescribed conditions for a State to be considered responsible for a wrongful international act is that the act or omission in question must be "attributable to that State". A similar provision is contained in Article 3 of the draft articles on the responsibility of States, the first part of which was provisionally adopted by the International Law Commission in 1980[1]. This text also contains detailed provisions regarding what may be termed "acts of State" under international law. While the first category of this kind of acts logically consists of the behaviour of any State organ deemed to be such under the law of the country (Art. 5), it is denied that the behaviour of a person or persons not acting on behalf of the State can be considered an "act of State" (Art. 11).

The reason for mentioning these two drafts is that the behaviour for which the Applicant considers the Italian Government to be responsible may indeed be partly attributed to the Respondent, but must partly be attributed to others. In fact, it is not denied that both the requisition decree issued by the Mayor of Palermo in his capacity of government official and the decision taken by the Prefect of Palermo on the appeal by ELSI can be attributed to the Italian State. The same cannot be said, however, of the alleged interference in the bankruptcy proceeding, in so far as it occurred through the action of the receiver (who, in fact, represents the creditors and acts in their interest) under the control of the bankruptcy judge. And above all it is denied that one can attribute to the Italian State any decisions taken by an IRI company (ELTEL) or by IRI itself outside the exceptional case of a specific government directive, as it was clearly shown that the IRI group is legally and effectively independent from the Government. With regard to the latter point, Article 7, paragraph 2, of the draft articles provisionally adopted by the International Law Commission considers as an "act of State" the behaviour of the organ of any agency which is not "part of the structure of the State or of a public territorial community", but is "empowered by the internal laws of the State to exercise powers of public authority in so far as the organ has acted in such a capacity in the case in point". It is easy to show in the present case that the organs of IRI or of companies associated with the IRI group have no powers to act as a public authority under Italian law and therefore have not acted in such a capacity.

The indifference of the Applicant about the existence of a causal relation between the alleged losses and the actions defined as wrongful, and about the limits within which such an action may be attributed to the Italian State is displayed in numerous assertions contained in the Reply. By way of example one may quote the passages contained on page 363, *supra*, where it is stated that the requisition "prevented Raytheon and Machlett from selling ELSI's assets and thus proceeding with the orderly liquidation as planned". It is added immediately afterwards that, despite the steps taken immediately by the two companies to have the requisition removed, "the Respondent refused to quash the order and indeed told Raytheon that it would continue indefinitely"[2]. It must be objected that: *(a)* it was not the requisition, having only six months' validity, that prevented the sale of the ELSI plant and the orderly liquidation of the company after 30 September 1968; *(b)* any impediment was due to the bankruptcy requested by ELSI, and it has yet to be proved that the latter was to be a consequence of the requisition; *(c)* it is completely untrue that the Prefect of Palermo refused to quash the requisition decree; indeed, its decision was to quash it; *(d)* it was never intended that the requisition should continue indefinitely: this would have implied a modification of the decree of the Mayor of Palermo fixing the term as six months from 1 April 1968, and such a modification was never made; *(e)* the declarations allegedly made by the President of the Sicilian Region on 19-20 April to the effect that the requisition would continue after its normal expiry were clearly made by a non-competent organ, as personal anticipation unwarranted and not confirmed by facts. They cannot be attributed to the Italian Government.

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[1] The English text of the draft Articles is in the *Yearbook of the International Law Commission*, 1980, II, 2, pp. 30 ff.

[2] Reply, p. 363, *supra*.

PART I. STATEMENT OF FACTS

1. Summary

In addition to the remarks already made in the Counter-Memorial, the following observations, concerning in particular:

(A) the requisition;
(B) the prefect's decision;
(C) the occupation by the work force;
(D) ELSI's situation and IRI's role;

are now submitted to the Court.

2. (A) The Requisition. Italian Practice concerning the Requisition of Plants

The adoption by the Mayor of Palermo, acting as a government official, of a decree for requisitioning the ELSI factory, which was then overruled by the Prefect, is the only allegation of fact made by the applicant Government. All the other allegations made by the Applicant are merely unproven assertions which may be rejected out of hand.

2.1. It was pointed out in the Counter-Memorial[1] and will be repeated here, that during the period of time under consideration, the requisition of plants by mayors was a common occurrence throughout Italy and was used mainly to protect the jobs and salaries of the employees of companies threatened with closure, so that the companies' financial difficulties would not have a negative effect on employment. Moreover, the requisition of plants was ordered to eliminate the negative effects on the local economy and on law and order deriving from a prolonged suspension of production in the requisitioned plant.

That this was a common practice among Italian mayors at the time during which also the ELSI requisition was decreed, is shown not only by judicial decisions concerning them, as mentioned in the Counter-Memorial[2] and which will be again described in detail in the following pages, but also by the discussions by scholars of the general problem of the mayors' power to requisition industrial plants.

2.2. It is no coincidence that an essay by Professor Bigliazzi Geri was published in 1969 which concluded that mayors actually do have the power of requisitioning industrial plants under Article 42[3] of the Constitution. In the essay some preliminary considerations concern the requisition decree by the Mayor of Monsummano (issued on 6 February 1964) of a plant, the closing down of which had led to the immediate dismissal of all the workforce. As the author pointed out, this decree was, as is known, not unprecedented, since there are reported cases of similar measures having been taken by mayors in similar situations[4].

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[1] Counter-Memorial, p. 13, *supra*.

[2] *Ibid.*

[3] See Doc. No. 33.

[4] Lina Bigliazzi Geri, "Urgente necessità, requisizione d'azienda e potere del sindaco", in *Democrazia e Diritto*, 1964, pp. 93 ff.

The Mayor of Palermo at the time, Dr. Bevilacqua, stated in his affidavit[1] that the requisition decree of the ELSI plant was in accordance with the policy followed by mayors of many Italian towns at that time in similar circumstances. He also explicitly mentioned the requisition decree by the Mayor of Florence issued shortly earlier with regard to the "Nuovo Pignone" Company.

It may be useful to describe the most significant cases in order to show that the Mayor of Palermo conformed to the practice followed by mayors in other parts of Italy, both before and after the period in question.

One typical instance is the "Marzotto case"[2], which gave rise to a complex judicial litigation originating from the requisition of a plant decreed by the Mayor of Pisa on 25 June 1968 in response to the fact that, in view of the serious crisis in the textile sector, activity had ceased pending structuring.

The underlying reasons for the Mayor's decree are clearly expressed in the decree itself.

At the beginning it is stated, that the management of the company had ordered production to be suspended indefinitely in one of its factories employing some 850 workmen and clerical staff. The measure was considered to be "socially unacceptable", to have caused a situation of severe hardship for the Marzotto employees and their families, and to have consequently strongly jeopardized the economy of the town. In view of the fact that the Marzotto plant at Pisa, which had been operating in the wool sector for several decades, employing well-trained specialist personnel, was one of the cornerstones of the economy of the town and the area surrounding it, the decree also pointed out that the suspension of activity would cause irreparable damage to the township, as the difficult general economic situation facing the town would not allow the dismissed Marzotto employees to find employment elsewhere. Furthermore, the various contacts with the management had not led to any positive results and it was not possible to forecast when the plant might open again. Thus, there was a serious state of public necessity, and urgent and exceptional measures had to be taken in order to avoid the definitive closure of the plant and to preserve the plant and equipment so that production could start again promptly.

A requisition in similar circumstances was decreed by the Mayor of Piteglio on 22 July 1968 concerning the Lima paper mills owned by "Stabilimento toscano carta e affini". This was taken in order to avert a situation which had much in common with the Marzotto case.

It is of great interest to read the grounds on which the requisition decree was issued, especially in view of the emphasis placed by the Mayor on the principle of the "social function" of ownership (Arts. 41, para. 2, 42, para. 2, of the Constitution)[3]. He described as "antisocial" the behaviour of the company, which he expressly defined as "socially unacceptable". The said principle was also indeed to explain the requirement of "urgent need". In this particular case, this need was identified as the serious hardship and irreparable damage the owners' attitude would cause to the employees concerned and consequently to the whole township. The terms "*public* interest" or "*public* necessity" (in Art. 7 of the Law No. 2248 of 1865[1]: "serious and urgent public necessity", or in Art. 834 of the Civil Code[2], with reference to expropriation, "in the public interest") were given the broad meaning of "general interest". Therefore, this was not intended as referring to the interest of the State or of public agencies, but also to that of a wider category of subjects, such as the employees and their families, and, by extension, the entire township.

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[1] See Affidavit of Dr. Bevilacqua, doc. No. 2. That this was not an exceptional measure and that many other such urgent measures were taken by Italian mayors in similar circumstances is also confirmed by Dr. Ravalli, the Prefect of Palermo at the time of the events in question, in his Affidavit, doc. No. 8.

[2] For an accurate reconstruction of the dispute, see Bigliazzi Geri, L., "L'affare Marzotto", in *Riv. giur. lav.*, 1968, I, pp. 415 ff. For the text of the Supreme Court decision see Counter-Memorial, doc. No. 23.

[3] See doc. No. 33.

Equally typical is the case of S.p.A. Torrington of Genoa, an associate of the international Torrington group, which manufactured needles for the textile industry.

The Torrington group came to Italy in October 1958 when it purchased the Aghi Zebra San Giorgio plant, which employed some 150 persons. The number of employees subsequently increased four-fold as a result of increased production, which was remunerative for a time.

However, also as the result of deteriorating working conditions (strikes and absenteeism), the economic situation took a turn for the worse in 1973-1975. Considerable losses were incurred and the company was wound up.

The trade union organizations decided to occupy the plant. On 6 November 1975 the Mayor of Genoa requisitioned the same plant.

The Mayor's decree explicitly stated that the prolonged suspension of production and the dismissal of the employees had had a serious effect on the economy of Genoa. Social tensions had been sparked off which would inevitably grow and even lead to specific problems of law and order.

While the Mayor's power to requisition plants was acknowledged in principle by the Consiglio di Stato, the requisition decree was set aside for reasons relating to the special circumstances of the case[3].

2.3. Another case which aroused much interest was that of the Società Italiana Industria Zuccheri (S.I.I.Z.)[4].

By means of a decree of 16 July 1974, the Mayor of Chieti requisitioned the S.I.I.Z. sugar mill of Chieti Scalo for a period of 90 days. The management of the plant was entrusted to the Abruzzo Development Agency for the purpose of carrying out and administering the 1974 sugar beet campaign. It was the company which had the intention not to carry out the sugar beet campaign in the Chieti plant in 1974.

By means of the requisition, the Mayor intended to ward off the economic and social damage which would befall the employees if the company ceased its operations.

The use of the S.I.T.E. company may also be mentioned[5].

On 16 September 1974 the employees of the Padua branch, as a result of threats of dismissal to reduce staff, occupied the plant, thus preventing the construction activities from being carried on. On 29 September 1974, the Mayor of Padua ordered the requisition of the S.I.T.E. plant.

A further case concerned the Soc. Manifattura dell'Adda, whose plant was requisitioned by decree of the Mayor of Berbenno in Valtellina on 20 February 1975, in order to ensure the continuity of its production, which was considered essential for the economy of the area.

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[1] See Memorial, Ann. 34.

[2] See doc. No. 16.

[3] Decision No. 72 of Consiglio di Stato, dated 7 February 1978, in Counter-Memorial, Ann. 29.

[4] For further details see Decision No. 198 of T.A.R. of Abruzzo, dated 30 December 1974, reproduced in doc. No. 7.

[5] See also Counter-Memorial, p. 13, *supra*.

The Manifattura's difficulties, together with those of the Fossati plant in Sondrio, contributed to the serious economic and social crisis affecting the whole valley. Consequently, also in Berbenno it was necessary to evaluate the possible effects on law and order that such a state of uncertainty might have. While the administrative court upheld the company's appeal against the requisition, it nevertheless noted that the Mayor's concerns over a possible worsening of the situation and its possible repercussions on law and order were justified[1].

A further example is the case of the San Marco Company, the plant of which was requisitioned in 1975 for the purpose of ensuring, in the interests of local employment, the company's future activity and, thereby, to safeguard law and order[2].

During the same year, by a decree issued on 2 February 1975, the Mayor of Sondrio provided for the immediate requisition of the plant of S.p.A. Cotonificio Felice Fossati, in order to ensure the continuity of the company's activity, considered essential both for the area's economy and for the public interest[3].

For the same reasons, on 14 September 1974, the Mayor of Brindisi requisitioned the plant of Società Industriale del Mezzogiorno (SIDELM)[4].

At the end of 1973 the management of SIDELM acknowledged that considerable losses had been made in previous financial years. Furthermore, it expected the situation to worsen owing to unfavourable market conditions. The management therefore decided to wind up the company.

The plant was then occupied by the work force.

The prolonged negotiations and continuing occupation worsened the discontent of the work force and heightened trade union and social tension. The resulting situation led the Mayor to issue a requisition decree on the basis of Article 7 of Law No. 2248 of 20 March 1865, Appendix E. The requisition was of six months' duration; the management of the plant was entrusted to the Progresso e Lavoro Co-operative of Brindisi.

As reported by the administrative court in the decision on SIDELM's appeal[5] the decree stressed that, in view of public demonstrations and the spreading of inaccurate and alarming information in the press, "the situation had become untenable and unbearable". It also alluded to possible reactions by the trade union organizations and the employees, who had expressed their intention "to occupy the railway station very soon".

In the well-known Eridania Zuccherifici Nazionali S.p.A. case[6] the requisitions were made because the company intended to close down the plants, and consequently dismiss the work force. It was considered urgent to reassure the population concerning the future activity of the plants, which were an indispensable hub of economic life for the whole area and the intention was to protect law and order which had been jeopardized by the state of unrest reflected in all the productive and commercial sectors.

It may therefore be concluded that mayors had frequently resorted to the use of their power to requisition industrial plants for reasons of law and order or also in view of social unrest.

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[1] For the text of the full translation of the decisions of the administrative court, see docs. Nos. 9 and 10.

[2] Already cited in Counter-Memorial, p. 13, *supra*.

[3] See Decision No. 211 of T.A.R. for Lombardy, dated 30 July 1975, doc. No. 9; Decision No. 21 of the Council of State, V Section, dated 18 January 1977, in Counter-Memorial, doc. No. 28.

[4] Counter-Memorial, p. 13, *supra*.

[5] See *ibid.*, doc. No. 25.

[6] *Ibid.*, p. 14, *supra*.

The concept of "economic and social law and order" thus emerged. Indeed, the requisition of plants for reasons of "law and order" was used as a means of protecting public security in the economic and social sense.

The cases reviewed above show how the requisition decree issued by the Mayor of Palermo in 1968 was a measure that many Italian mayors have taken under similar circumstances.

3. Instances of Requisition of Plants in the United States

However, the criticism expressed by the United States Government over the fact that, even in such a difficult period for the Italian economy, the authorities of this country could, as an extreme remedy for particularly serious crises, have recourse to the temporary requisitioning of plants appears even more surprising in view of the fact that in the United States such a practice is anything but unknown.

> "The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties, such as laundries, or coal mines, or railroads, may be subjected to public operation only for a short time to meet war or emergency needs, and can then be returned to their owners (. . .)":

this statement was made by the United States Supreme Court when, in 1951, it was called upon to decide on another case of temporary taking of a plant by the public authorities in the difficult years of post-war reconstruction[1].

The case in point is of particular interest for the present dispute as it concerned a coal mine where production was virtually blocked due to a strike and which, as a consequence thereof, the Federal Government had decided to requisition and to operate under its own responsibility for six months in order to avoid total paralysis of coal-mining activities in the country[2]. Far from considering the requisition as such to be unlawful, the Supreme Court merely addressed the question of the compensation to be paid to the owner of the mine as a result of the requisition by the Government. In this context, the Court attempted to rationalize the subject of requisition or "temporary takings" in the light of its abundant case law. As the Court stated,

> "[t]emporary takings can assume various forms . . . There may be a taking in which the owners are ousted from operation, their business suspended, and the property devoted to new uses (. . .). A second kind of taking is where, as here, the Government, for public safety or the protection of the public welfare, 'takes' the property in the sense of assuming the responsibility of its direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company. Examples are the operation of railroads, motor carriers, or coal mines (. . .)[3]."

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[1] *Pewee Coal Company Inc.* v. *United States*, 71 Supreme Court, p. 670, at p. 673.

[2] The same mine has been subjected to a total of four separate temporary takings by the Federal Government, ranging in duration from three months to one year, although the reason was always the same, namely that "of ending strikes and restoring the production of coal in the national interest" (cf. *Pewee Coal Company Inc.* v. *United States*, 161 F. Supp. 952, at p. 955).

[3] 71 Supreme Court, 670, at p. 673.

Without making at this stage a detailed examination of the criteria used by United States courts when determining the compensation to which the owner is entitled in the case of the temporary taking of his plant by public authorities, it may be noted that it shows that only in a few cases the principle of "just compensation" has led to the granting of compensation equal to the "fair market value" of the property taken. In cases in which, because of the economic crisis and/or strikes in progress prior to the intervention of public authorities, the value of the requisitioned plant was reduced, the United States courts had no hesitation in allowing only compensation smaller than "fair market value".

What is here important is to show that the practice of requisitioning plants in cases of proven urgency and/or need to safeguard the general interests of the economy and social peace is a remedy that has been used also by the United States Government. Furthermore, while in Italy it is clear that the power of requisitioning of the public authorities only exists if and to the extent that it is expressly recognized by law, in the United States it is uncertain whether the authorization of the legislator is in any case required or whether the taking of private property for public use by an officer of the United States is admissible "as an act of Government" even in the absence of an explicit or tacit authorization by an Act of Congress[1].

4. (B) The Prefect's Decision

As already clarified in the Counter-Memorial[2], contrary to the Applicant's assumption, ELSI waited a good 19 days before making its appeal to the Prefect and more than one year before urging the Prefect to take its decision. The Prefect, as shown by the Affidavit of Dr. Ravalli[3], had formed the reasonable conclusion from ELSI's behaviour that the company had no strong interest in the result of the appeal.

This is confirmed by the fact that the company filed a petition for bankruptcy barely one week after lodging the appeal with the Prefect. Thus, a favourable decision of the appeal would not have had as the consequence the free management of the assets.

What the Applicant states on page 390, *supra*, of its Reply, namely that "if the requisition had been rescinded, the bankruptcy could have been avoided by ELSI", is totally inaccurate. It was ELSI's long-standing insolvency that led to its bankruptcy. Only if the state of insolvency had been uprighted — a neither unlikely event within those few days — bankruptcy could have been avoided.

The truth is that the Prefect's decision:

(*a*) was irrelevant to ELSI's state of insolvency, and indeed the company filed for bankruptcy without waiting for the decision on the appeal and without urging it; it was in any event irrelevant after the expiry of the six months, in view of the temporary nature of the requisition;

(*b*) was rendered within the period of time representing the average of this type of appeal[4];

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[1] For the negative case see *Youngtown Sheet Tube Co. et al.* v. *Sawer, Secretary of Commerce* and nine other cases, 103 F. Supp. 569, at p. 573; the case involved a requisition order issued by the Secretary of Commerce following an Executive Order by the President of the United States himself regarding the main steel factories in the country, which had been hit by a wave of strikes called for an indefinite duration.

[2] See Counter-Memorial, p. 16, *supra*.

[3] See doc. No. 8.

[4] Counter-Memorial, p. 17, *supra*.

(c) was taken as soon as ELSI (or the receiver acting on its behalf) urged the decision, after 14 months.

Therefore to argue, as the Applicant does on **I**, pages 64–65 of its Memorial, and pages 363 and 372, *supra*, of its Reply, that the decision was rendered by the Prefect only after ELTEL had acquired the company assets amounts to captiously exploiting a chance time sequence to obtain a facile effect.

It must likewise be stressed that the complete reading of the Prefect's decision, instead of a quotation of fragments out of context (as the Applicant does on page 384, *supra*, of the Reply), leads to the appreciation that the Prefect acknowledged that the Mayor was entitled to exert the powers of requisition in accordance with the laws referred to, although he actually quashed the order because in actual fact it was not possible to achieve the intended result, i.e., the reopening of the plant.

5. (C) The Occupation by the Work Force

The Applicant's assertions over the occupation of the plant are incorrect. The work force occupied the plant more than two weeks before the requisition, as is shown by a judicial decision and press reports[1] and not afterwards, as the Applicant would have it[2].

6. (D) ELSI's Situation and IRI's Role: the Applicant's Contentions

According to the United States Government, the Italian Government and IRI first boycotted the attempt to proceed with the "orderly liquidation" of ELSI, and then interfered with the bankruptcy proceeding so as to allow IRI to acquire the plant through one of its subsidiaries at a price lower than its fair market value.

This argument is based on the following three assumptions, which form the heart of the Applicant's presentation[3]:

* ELSI was a *going concern*, in good, although not perfect, financial health at the time of the events in question;
* the ELSI industrial complex was competitive and thus attractive to the market in that it was capable of the "manufacture of high quality and highly sophisticated electronics";
* finally, IRI or one of its subsidiaries is alleged to have "boycotted" the first three auction sales in order to decrease the market value of the plant which was subsequently purchased by ELTEL.

All three of the above contentions are totally gratuitous in that the United States Government does not produce a shred of evidence in support of them. Furthermore, they are not true. This objection, already expressed in the Counter-Memorial of the Italian Government[4], was not challenged in the Reply, as the passive repetition of the original arguments which have been proved unfounded cannot be taken as a challenge. Consequently, the Italian Government can justifiably claim that the basic premises of the application are not founded on evidence presented in either the United States pleadings, but is merely conclusory, assertive, and argumentative.

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[1] Cf. the decision of the Court of Palermo, in Memorial, Ann. 80, in particular at **I**, p. 374 and the article appeared in *L'Ora*, 10 March 1968, doc. No. 30.

[2] Memorial, **I**, p. 100. Reply, p. 372, *supra*, note 1. The distinction between actual and occasional sit-ins, which was suggested by the Applicant, lacks of any supporting evidence. The truth is that, the occupation having taken place in March, there was no reaction on the part of ELSI, which obviously had legal interest in the matter.

[3] See Reply, pp. 365 ff., *supra*.

[4] See Counter-Memorial, pp. 4 ff., *supra*.

7. ELSI's Economic and Financial Situation

ELSI's crisis, which was stabilized when the events in question occurred, is evident from the very statements made in the Memorial and Reply of the Applicant Government, namely that:

(a) ELSI's debts, according to the Memorial, I, page 52, amounted to 16.66 billion lire;
(b) its assets, which had a book value of 17.05 billion lire, could not, as even Raytheon admits (Memorial, I, p. 52), be assigned a quick-sale value of more than 10.84 billion lire;
(c) there was consequently a negative balance of about 6 billion lire, and since Raytheon itself admitted that ELSI was unable to meet its obligations, it must be assumed that the part that could not be met amounted to at least 6 billion.

Nor can it be argued that the above-mentioned negative balance was due solely to the probable lower price obtained on the market in the course of a quick sale. Indeed, ELSI's state of insolvency would certainly have been known to a conscientious management since it had been in existence since late 1967. Three points are of interest in this regard:

(i) In 1967 ELSI incurred a loss of more than 2,000 million lire (after losing 326 million in 1962, 1,228 million in 1963, 284 million in 1964 and 361 million in 1965)[1] and was obliged to proceed to reduce and then increase its capital. Despite this, in 1967, ELSI again lost more than one-third of its capital, thus revealing beyond any doubt that it was incapable of producing even the minimum amount of income it needed to survive on the market. The disastrous trend that now begins to be outlined is certainly not compatible with the image of a "going concern" and solvent enterprise suggested by the Applicant Government. Furthermore, this was formally recognized by Raytheon management[2].

(ii) The ELSI financial reports leave ample space for doubt. Dr. Giuseppe Mercadante, who analysed them on behalf of the Bankruptcy Court, noted, among other things: the need for writing down stock for an amount "oscillating" between Lit. 1,500,000,000 and Lit. 2,000,000,000[3], the inclusion of non-existent assets in the balance sheet (for instance, an entry of Lit. 246,296,774 against a certain Neye Alfred Enateckmer of Quickborn (West Germany)), when the goods forwarded to this client had already been returned by the latter and were still held in customs[4]; and again direct "accommodation bills discounted with the banks" for an amount of Lit. 1,200,000,000[5]. Consequently, ELSI's true losses for 1967 alone, which are obtained by adding to the amount entered under this heading in the official balance sheet (Lire 2,681,300,000) the decreases in value due to the above-mentioned items, actually wiped out the company's share capital, even though the latter had only recently been increased; all this in a company which, in order to achieve liquidity, had been obliged to discount "accommodation bills", i.e., bills that do not relate to any commercial transaction.

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[1] See Counter-Memorial, p. 4, *supra*.

[2] See Project for the Financing and Reorganization of the Company — 1967 Report prepared by Raytheon-ELSI S.p.A., Memorial, Ann. 22.

[3] See the Technical-Accountancy Advice on "Raytheon-ELSI S.p.A.", Counter-Memorial, doc. No. 36, at p. 214, *supra*, of the new translation presented by the Italian Government.

[4] *Ibid.*, p. 212, *supra*.

[5] *Ibid.*, p. 216, *supra*.

(iii) As indicated in the Affidavit of Mr. Joseph A. Scopelliti[1], already in early 1968 Raytheon had to transfer 150 million lire to the First National City Bank of Milan to cover the demands of an ELSI creditor who would not be fended off with vague promises of future payment. ELSI was therefore unable to meet even the smallest of its commitments with its own resources, thus revealing that its insolvency was not only economic, but also financial.

The concept of "orderly liquidation" sounds quite odd against such a background. This even more so, as also the concept of "going concern" mentioned by the United States Government displays some very peculiar features. The production lines were closed and, in early 1968, the only activity of ELSI was to complete a number of unfinished products. Moreover, on 2 March 1968, the workers actually began an occupation of the plant and the management deemed it prudent to remove all the accounting files from the head office and take them to a small office in Milan. Thus, the overall picture was as follows: the company had a chronic deficit; its production lines were shut down; its work force was occupying the plant; its management had practically disappeared.

8. The Responsibility for ELSI's Crisis

The economic and financial disaster described above may be attributed directly to erroneous company management and misguided speculation by Raytheon. It is important to state it, because the Applicant wrongly contends that "Raytheon and Machlett did nothing to create ELSI's financial problems".

Suffice it to recall a few financial figures:

(a) Dr. Mercadante, in his 1968 Report to the Bankruptcy Court, points out that, in the ELSI financial reports of the previous three years, the royalties paid to Raytheon, the costs of Raytheon technical assistance and Raytheon technical consultants' costs appeared to be blown up out of all proportion both in absolute terms and compared with the cost of surveys and experiments also paid for by the company. Dr. Mercadante's report states that it is not clear

> "why the company spent so much on studies, research and development (not counting amongst others the high cost for technical consultants) while paying royalties to its holding company which should have permitted a well-organized production adopting the production lines laid down by the same",

while "there are indications that the company, after a number of years' production, had not yet defined its production lines" and "that the main losses resulted in the SCD sector (electronic equipment), revealing it to be a complete failure and on which huge amounts of money had been spent;[2]".

(b) ELSI debts amounted to an average of 12 billion lire, on which it had to pay a huge amount of interest. In the previous three fiscal years[3], ELSI on average paid interest of 800 million lire per year (lire of the time), excluding the interest paid on medium-term loans. Taking into account the much smaller amount of equity invested by Raytheon, this means that ELSI was undercapital-

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[1] Memorial, Ann. No. 17, I, p. 186.

[2] See the Technical-Accountancy Advice of Dr. Mercadante, *supra*, at pp. 215-216.

[3] *Ibid.*, pp. 213-214, *supra*.

ized from the start and therefore doomed to go bankrupt unless it could obtain a resounding commercial and industrial success[1].

Dr Mercadante pointed out that, if ELSI management had had "greater technical rectitude" it would not have allowed the "large costs" on surveys and research, etc., in view of the "fact that the overall aim of the company has not been achieved after so many years of activity"[2] and that these expenses were "not justifiable"[3].

One may add that obsolete equipment had been acquired by ELSI (e.g., the semiconductor production line, which proved to be the most ruinous)[4].

Some reasonably critical analysis of the matter is quite sufficient to close the argument of ELSI's "high quality" and "highly sophisticated" electronics (which, anyway, found no market) and to show that Raytheon and Machlett had more than some responsibility in creating financial problems for ELSI.

9. The Obligation to File a Petition for Bankruptcy

In its Reply, the Applicant Government stresses the fact that ELSI management was under no obligation simply to file for bankruptcy. To this effect it cites the opinion of Professor Franco Bonelli[5]. Yet, the contention is groundless. In 1967, Raytheon's official losses amounted to 2,681.30 million lire. According to Dr. Mercadante, a further sum of 1,200-1,500 million lire must be added for over-evaluation of stock and at least 300-400 million for non-existent credits. The situation must have been worse[6] since it would otherwise be impossible to explain the large gap of 6 billion lire between book value of ELSI's assets and the value acknowledged by Raytheon itself in the case of a quick sale. This leads to the following conclusions: *(a)* ELSI's capital (amounting to 4,000 million) was completely lost; *(b)* the failure to call a meeting to immediately restore share capital to the minimum level required by law or, alternatively, to wind up the company, actually represents an offence committed by the management (see Arts. 2447 and 2621 of the Civil Code[7]); *(c)* the management was liable for prosecution for simple bankruptcy (see Art. 217, Nos. 3 and 4 of the Bankruptcy Law[8]) since, notwithstanding the company's insolvency, no petition for bankruptcy was filed; and *(d)* the offence of misuse of credit (Art. 218 of the Bankruptcy Law), in so far as the management, by concealing the company's financial difficulties, continued to live off loans, including the 150 million received from Raytheon in early 1968 to pay off a recalcitrant creditor. Thus, it is clearly established that not having increased ELSI's capital, and having come to know that the shareholders had no intention of doing so, ELSI's management should have filed for bankruptcy[9].

Under these circumstances, the hypothetical "orderly liquidation", envisaged by the Applicant Government, could certainly not take place. In fact, things were quite different. After acknowledging that it was unable to pay its debts, as is clear from the fact that it was intended to satisfy unsecured creditors claims to the extent of only 50 per cent. ELSI was now trying to avoid bankruptcy in the hope that the creditors would accept large cuts. At the same time, contrary to the Applicant's contention, Raytheon never showed willingness to provide ELSI with sufficient liquidity to proceed with an orderly liquidation.

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[1] See Affidavit of Ing. Busacca, Counter-Memorial, p. 230, *supra*, and doc. No. 44.

[2] See Mercadante Report, p. 216, *supra*.

[3] *Ibid.*, p. 213.

[4] See Affidavit of Ing. Busacca, Counter-Memorial, doc. No. 44, and the Affidavit of Ing. Ravalico, doc. No. 14.

[5] See Reply, Ann. I.

[6] See, for instance, on the state of the art, the remarks of Ing. Ravalico, doc. No. 14.

[7] See doc. No. 16.

[8] See Counter-Memorial, doc. No. 21.

[9] For these considerations and for the obligation of ELSI's management to file for bankruptcy, see the opinion of Professor Pier Giusto Jaeger, doc. No. 32.

After all, an orderly liquidation, and not only in the Italian legal system, requires the 100 per cent satisfaction of creditors, while Raytheon and ELSI suggested 50 per cent.

In fact, the Applicant appears to consider the hypothetical "orderly liquidation" as a remedy which would be available also to an insolvent debtor, while under Italian law an insolvent debtor is from the outset under an obligation to file for bankruptcy, and therefore cannot maintain possession of its assets, manage them, and freely liquidate them.

Therefore, to speak of "orderly liquidation" as the natural way of winding up ELSI, and to criticize the failure to allow Raytheon to do so, is also the result of a distorted view of the applicable law to the case in point.

In this connection it is not inappropriate to recall that on 1 January 1968 President Johnson promulgated an executive order establishing a mandatory programme restraining US direct investment abroad[1]. Although not mentioned in the US pleadings, this programme had a broad and important negative effect on the ability of US businesses such as Raytheon to lend or invest additional funds and working capital to their foreign subsidiaries, or to perform guarantees of indebtedness of such subsidiaries[2].

The effect of the Regulations was particularly harsh on parents of subsidiaries such as ELSI, operating in Western Europe[3].

The effect of the Regulations was to force US parent corporations to offset their "direct investments" in their subsidiaries by making "long-term foreign borrowings" in the Eurodollar market[4]. However, in addition to the increased expense of any such borrowing, under the Regulations a repayment would eventually be "charged against" the permissible activity of the US parent in future years; in 1968 there was no way of knowing when and how this unprecedented and severe programme would be dismantled[5].

Most importantly, for a new guarantee of indebtedness of a foreign subsidiary to be authorized, there were requirements for certification that the parent company "has no reason to believe, under existing circumstances, that the affiliated foreign national will be unable to pay or otherwise satisfy such indebtedness without resort to performance under the guarantee[6]". No such certification could have truthfully been made as to ELSI. Concerning payments of pre-existing guarantees, the US parent would have had to "determine . . . in good faith that (its foreign subsidiary) . . . has not sufficient funds available to it to pay such indebtedness[7]".

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[1] See "Message to the Nation on the Balance of Payments" and Executive Order No. 11387, reproduced as Anns. (1) and (2) of Federal Reserve Bank of New York Circular No. 6090 of 4 January 1968; see doc. No. 25.

[2] See Regulations of the Secretary of Commerce, dated 1 January 1968 (CFR Title 15, Ch. X, Part 1000), reproduced as Ann. (3) of Federal Reserve Bank Circular No. 6090, and in particular Sec. 1000.312 *(a)* and *(e)* of the Regulations, doc. No. 25.

[3] See *ibid.*, Regulations Sec. 1000.319 *(c)*.

[4] See *ibid.*, Regulations Sec. 1000.504 *(b)*.

[5] See for example speech delivered by the Vice-President, Tax-Legal, of the National Foreign Trade Council on 9 October 1968, at pages 3-5; doc. No. 26.

[6] See General Authorization No. 1 of 22 January 1968, Sec. (2) *(a)* (1), contained in Federal Reserve Bank of New York Circular No. 6012 of 25 January 1968; doc. No. 27.

[7] *Ibid.*, Sec. 2 *(a)* (2).

The difficulties perceived by Raytheon in handling its overseas business in view of these regulations were mentioned neither in the Memorial nor in the Reply, although doubtless they were a contributing (and governmental) cause of Raytheon's announced intent to terminate ELSI's operations in 1968[1].

10. The Claims Brought by Italian Banks Against the Sole Shareholder of ELSI

Perhaps the stubbornness with which the Applicant Government claims that ELSI was entitled to proceed with an orderly liquidation and that the bankruptcy petition became necessary only as a result of the requisition decree and the consequent loss of free access to its plant, may find its reason in the fact that, perhaps unconsciously, it tends to argue in terms of the bankruptcy law of the United States. In fact, there are several basic differences between United States law and Italian law which will be clarified here in order to avoid further use of concepts which, in spite of their identical nature, have completely different meanings when referred to one legal system rather than to the other.

Unlike Italian bankruptcy law and that of the majority of other continental systems, all of which are notoriously "creditor oriented", the main characteristic of United States bankruptcy law has always been that of being "debtor oriented". In other words, in Italy, and in Continental Europe in general, bankruptcy is mainly considered as a sanction which befalls the insolvent debtor in order to safeguard the prevailing interest of the creditors in a prompt and equitable satisfaction from the proceeds of the sale of the debtor assets. On the contrary, in the United States bankruptcy is rather a means placed at the debtor's disposal, to discharge his previous debts and resume his activity on a fresh footing ("fresh start doctrine") irrespective of its insolvency[2]. Thus a bankruptcy petition may be filed also by a solvent debtor ("Voluntary cases": Sec. 301, Bankruptcy Act), whereas in case of insolvency, the creditors may file a bankruptcy petition against the debtor ("Involuntary cases": Sec. 303, Bankruptcy Act), but there is no obligation for the debtor to file a petition himself. Furthermore, even an insolvent debtor may choose between a bankruptcy petition under Chapter 7 of the Bankruptcy Act ("Liquidation") and a petition for reorganization under Chapter 11 of the same Act ("Reorganization"). In the first case, a trustee is appointed, who proceeds to liquidate the debtor's property and consequently distribute the proceeds among the creditors. In the second case the debtor, who normally retains his assets and continues to operate his business, prepares a "plan of rehabilitation" containing a complete list of creditors divided up into classes, indicating those who will suffer impairment of their rights and those who will not, and how the payments will be made. The plan will be binding for all concerned if it obtains the approval of the majority of members of each class of creditors or, failing this, if it is considered "fair and equitable" by the competent bankruptcy court.

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[1] In material filed with the United States Securities and Exchange Commission for the Fiscal Year Ended 31 December 1968 (Form 10-K Annual Report Pursuant to Section 13 or 15 *(d)* of the Securities Exchange Act of 1934, enclosing the Prospects of Raytheon Company dated 15 April 1968 (see doc. No. 24)), Raytheon said in respect of ELSI and its other foreign subsidiaries and affiliates that "The planned operations of these foreign companies are dependent, to an unpredictable degree, upon United States government regulations on foreign investments . . ." (p. 8 of Prospectus; p. 30 of filing); and in Item *(e)* of Part I of its 10-K filed for the fiscal year ended 31 December 1971 (see doc. No. 23) at p. 12, Raytheon wrote that "Continuation of the United States Foreign Direct Investment Regulation which became effective in 1968 might restrict the Company's ability to develop its international operations", showing that the problem with these regulations persisted for several years after 1968.

[2] "One of the primary purposes of the bankruptcy act is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . .": *Local Loan Co. v. Hunt*, 292 U.S. 234, at p. 244. On this point, see, also for further references to case law, King-Cook, *Creditors' Rights — Debtors' Protection and Bankruptcy*, Matthew Bender, 1985, pp. 777 ff.; Epstein, *Debtor-Creditor Law*, 3rd ed., West Publishing Co., 1985, pp. 138 ff.; *Collier Bankruptcy Manual*, Matthew Bender, 1961, pp. 176 ff.

What are the inferences that can be drawn from this with regard to the present case?

First of all, there is no doubt that, at least as from March 1968, ELSI was to be considered as "insolvent" even under the United States bankruptcy law. Indeed, Section 19 of the Bankruptcy Act prior to the 1979 reform reads as follows: "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property . . . shall not at a fair valuation be sufficient in amount to pay his debts." ELSI had acknowledged its inability to pay the larger creditors more than 50 per cent from the proceeds of the sale of its assets. Yet, the company would have been "insolvent" also under the new criterion introduced with the 1979 reform (Sec. 303 *(h)*: ". . . the debtor is generally not paying such debtor's debts as such debts become due . . ."). In fact, at the beginning of March, ELSI was going to face a complete lack of cash, as was confirmed by the company management itself, and specifically by John D. Clare, who, at a meeting with the President of the Sicilian Region on 20 February 1968 openly announced that "*(a)* Feb. 23 — Board Meeting; *(b)* Feb. 26-29 — inevitable bank crisis; *(c)* March 8 — we run out of money and shut the plant"[1].

Under United States law, ELSI would, however, not have been obliged to file a petition of bankruptcy, notwithstanding its insolvency. The company would also have been free to choose between a (voluntary) bankruptcy petition under Chapter 7 and a (voluntary) petition for reorganization under Chapter 11. In the first case its assets would have been liquidated immediately, while in the second case ELSI would have been able to continue its activity, in the hope of convincing its creditors or, failing to get their approval, to have the judge impose on them the "plan of rehabilitation" providing for the 50 per cent payment of credits or even less. All this, of course, is only theoretical because, in practice, it is anything but certain first of all that United States banks, placed in the same situation as the Italian banks vis-à-vis ELSI, would have waited patiently as long as the latter did, instead of filing an involuntary bankruptcy petition as they were entitled to do. Moreover, in a reorganization procedure the confirmation of an advantageous plan of rehabilitation to a large extent depends on the actual capacity for recovery of the insolvent company and ELSI could hardly be said to meet that requirement . . . Be it as it may, it should not be forgotten that ELSI was a company incorporated under Italian law and as such was subject to the bankruptcy law of Italy and not that of the United States.

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[1] Cf. doc. No. 19, containing the original handwritten minutes of the meeting. The Counter-Memorial quoted the passage in the minutes of a meeting held on 20 February 1968, in which the President of ELSI, John D. Clare, was reported as having drawn "a precise time chart showing *(a)* Feb. 23 — Board Meeting; *(b)* Feb. 26-29 — inevitable bank crisis; *(c)* March 8 — we run out of money and shut the plant" (Counter-Memorial, p. 9, *supra*). By a letter of 13 January 1988 addressed to the Court's Registrar the applicant Government supplied a photocopy of the manuscript version of the same minutes along with an attempt to justify why a different text had been annexed to the Memorial. The Italian Government prefers to refrain from making any comment on this explanation, but wishes to point out that the photocopy of the manuscript version fully confirms the accuracy of the quoted passage. The President of ELSI really drew his "precise time chart" over a month before the requisition decree. If this fact was suppressed in a later version of the minutes, the only conceivable reason is that whoever altered the text of the minutes he thought that it could be embarrassing for Raytheon.

11. More. The "Lifting of the Corporate Veil" Doctrine in Italian and United States Law

Again with regard to possible misunderstandings that could arise over the present case as a result of actual or supposed differences between Italian law and United States law, the Respondent Government wishes to point out that the action brought by the Italian banks against Raytheon and Machlett, as the sole shareholders of ELSI, in order to recover the credits claimed from the latter, can in no way be considered as discriminatory, or worse, as the product of the umpteenth plot carried out against the two United States companies.

It has already been emphasized that judicial action of this kind is normal practice in Italy in view of the widespread acceptance in legal theory and practice of applying the principle of the sole shareholder's liability for the company's obligations, as established in Article 2362 of the Civil Code, also in the case in which a negligible number of shares are attributed to another partner who is a pure figurehead[1].

But since in its Reply the Applicant Government continues to include among the damages to be paid by the Italian Government also the legal costs incurred by Raytheon and Machlett in the suits in question[2], it is worth here, in addition to recalling the remedies concerning the situation under Italian law, to note that the result would be exactly the same if the case were considered under United States law.

In fact, also in the United States, the problem exists as to whether and to what extent shareholders are liable for the obligations of their corporation. The conditions required "to disregard the corporate entity", or "to pierce the corporate veil" in a given case are still controversial; however, all authorities agree that, in some circumstances and in some particular cases, the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party (. . .)[3].

Generally speaking, the common significant factors which would justify disregarding a corporate entity have been under-capitalization, failure to observe formalities, non-payment of dividends, siphoning off of corporate funds by dominant shareholders, the insolvency of the debtor corporation at the time, non-functioning of other officers or directors, missing corporate records, use of the corporation as a front for the operations of the dominant shareholder[4]. The conclusion to disregard the corporate entity may not, however, rest on a single factor but often involves a consideration of a number of the above-mentioned factors; in addition the particular function must generally present an element of injustice or fundamental unfairness. Thus, to mention only those factors which are of particular interest in the present case, the courts are in general more willing to "pierce the corporate veil" when the defendant is a corporation rather than an individual, and are particularly likely to find the parent business entity liable if, for instance, the subsidiary and the parent are running parts of the same business, and the subsidiary is under-capitalized, and/or if the subsidiary has eventually been forced into bankruptcy[5].

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[1] See Counter-Memorial, p. 24, *supra*.

[2] Reply, p. 399, *supra*.

[3] Fletcher Cyclopedia Corporations (1983), I, pp. 388 ff. (with further references to both case law and scholarly writing).

[4] Fletcher Cyclopedia Corporations, *cit.*, pp. 428 ff. (with further references); Hamilton, *The Law of Corporations*, 2nd ed., West Publishing Company 1987, pp. 81 ff.

[5] Fletcher Cyclopedia Corporations, *cit.*, pp. 455 et seq. and pp. 472 et seq. (with further references); Hamilton, *The Law of Corporations*, *cit.*, pp. 91 et seq.

This being so, it seems clear that on this issue there are striking similarities between Italian law and the law of the United States or, more precisely, the law applied within each of the individual states of the Union. On both sides of the Atlantic Ocean there is no hard and fast rule as to the conditions under which the corporate entity may be disregarded; at the same time, according to both the Italian and the United States law, as a general rule, the "corporate veil" may be "pierced" and the liability of the shareholder(s) for the obligations of the corporation be affirmed, whenever the corporate fiction is being used by the corporation itself to defeat public convenience, justify wrong done either to third parties dealing with the corporation or internally between shareholders, or to perpetrate fraud or other reprehensible conduct.

This is not the place to express an opinion on whether or not the Italian courts were right when, although asked to do so by a number of banks having suffered substantial loss because of ELSI's insolvency, they repeatedly refused to "pierce the corporate veil" of that corporation and to allow the banks to recover their credits directly from its two shareholders. More than one distinguished scholar, when commenting on the decisions rendered, has argued that on that occasion the courts may not have taken into sufficient acceount the fact that ELSI was a typical example of a wholly owned subsidiary — Raytheon owned 99.15 per cent of the shares while Machlett, who held the remaining 0.85 per cent, *was just another wholly owned subsidiary of Raytheon* — which long before it went bankrupt was kept in a condition of clear undercapitalization by its parent company[1]. In the light of the foregoing remarks, however, it should be clear at least that there was absolutely nothing unusual in the fact that the Italian banks tried to recover from Raytheon and Machlett what they had been unable to get from ELSI. Any competent lawyer in either Italy or the United States would have urged the banks to do so, and it may well be that in the United States the banks would have been more successful than they actually were before the Italian courts.

12. The Quality of ELSI's Plant and Production

The considerations made so far concerning ELSI's insolvency already contradict the contention that the company purchased by Eltel was an industrial jewel, to gain possession of which a sort of plot was hatched. Indeed it does seem strange that such a highly productive company should have such a negative economic performance and that its promoters should make the decisions they did (i.e., Raytheon decided not to invest further money in ELSI, while ELSI dismissed the entire work force).

In fact, the following has to be said:

(a) ELSI's production was of a low quality. The expert of the Bankruptcy Court, Dr. Mercadante, expressly mentioned in his Technical-Accountancy Advice goods being returned by customs and defective products left in customs, etc.[2];

(b) an unhappy site had been chosen for the plant, with some of the sections actually situated at different levels[3];

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[1] See, among others, Pellizzi, "Unico azionista e controllo totalitario indiretto", in *Giurisprudenza commerciale* 1981, II, pp. 615 ff.; S. Scotti Camuzzi, *Unico azionista, gruppi, "lettres de patronage"*, Milan, 1979, pp. 30 ff.

[2] See Technical-Accountancy Advice on "Raytheon-ELSI", S.p.A., Counter-Memorial, doc. No. 36.

[3] See the Affidavit of Ing. Cavalli, doc. No. 1 and the Remarks of Dr. Alessandro Alberigi Quaranta, in doc. 20.

(c) the way the plant was structured was completely negative, because it was badly built and there was no adequate planning[1];

(d) the production lines were lacking in concrete functionality. The products had no market attraction and the semiconductor production had turned out to be a failure. Only a small proportion of the television components which were produced could be absorbed by the television set market. Other devices for television were now obsolete as they applied to black-and-white TV, while colour was becoming increasingly popular in Italy. This is proved by the fact that when ELTEL purchased the company, in 1969, it changed its entire production[2].

It is probably worth reporting fully what was declared by Ingegner Busacca, who was working for ELSI at the time and was in charge of microwave-tube design, and by Mr. Ravalico, the manager of ELTEL. The words of those having actually experienced the events are self explanatory.

According to Ingegner Busacca:

> "(. . .) As at 29 March 1968 Raytheon-ELSI had five production lines:
>
> 1. Semi-conductors.
> 2. X-ray tubes.
> 3. Black-and-white cathode ray tubes.
> 4. Telephone surge arresters.
> 5. Microwave tubes.
>
> The company's technical and economic situation can be descibed as follows:
>
> Semi-conductor line: the machinery was unserviceable and idle because it had been designed for germanium technology, which had been obsolescent for many years; an attempt was in progress to produce silicon diodes which, although technically valid, had no significant market.
>
> X-ray tube line: the machinery was very old and the manufacturing processing was carried out at great risk to the operators. The product was quite good but there was no scope for the research required to develop it, for improvement to the plant or for winning a share of the market away from the large electromedical apparatus constructors, who had their own production lines.
>
> The black-and-white cathode-ray tube line involved the majority of the active work force in operations, and ought to have been automated but it was not because black and white consumption was heading for certain decline. The processes were rather uncertain although the quality often happened to be good.
>
> The telephone surge arrester line was based on the exploitation of a patent and utilized makeshift equipment and involved high risks, since Cobalt 60 radioactive material was included in the products during processing.
>
> The microwave tube line was based on the market represented by the Hawk missile system and a small research activity had been started up.
>
> On the whole the plant was to be considered uneconomical: the plant engineering and available technologies were generally obsolete. The ma-

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[1] See the Affidavits of Ing. Cavalli, doc. No. 1, of Ing. Ravalico, doc. No. 14, and the Affidavit of Ing. Cammarata, doc. No. 13.

[2] See again the Affidavits of Ing. Busacca, Counter-Memorial, doc. No. 44, of Ing. Ravalico, doc. No. 14, and of Ing. Cammarata, doc. No. 13.

> chinery was intensively exploited, old and hard to manage. The work force was comparatively unskilled. A negligible impulse had been given to independent research and there was no available plan to renew the production lines (even by means of licensing)" (. . .)[1].

According to Rag. Ravalico, on the other hand:

> "(. . .) IRI 'interested' SIT-Siemens in proceeding with the acquisition of the bankrupt company, ELSI.
>
> The term 'interested' is actually inexact, because no-one was 'interested' in ELSI because of its well-known technical obsolescence and commercial incompetence. But to prevent trade union unrest — the year was 1968 — and sit-ins in Via Veneto in front of IRI head office, it was necessary to 'take an interest in the business', mainly for reasons of law and order. I personally directed the take-over operations in my (. . .) official capacity.
>
> After obtaining possession of the ELSI company, initially as lessees, we found the following situation:
>
> 1. The general facilities were inadequate, dilapidated and badly designed from the very beginning. The company had not grown according to an organic economic development plan. It had developed on a day-to-day basis. One of the consequences of this was that the production facilities had been sited haphazardly, in temporary structures, etc. As a result, most of the general facilities — after we had taken possession of them — were only scrap metal, and were sold off as such, because they necessarily had to be replaced by viable general facilities.
>
> 2. The production lines were all old, broken down and obsolete. The semiconductor line (the most bankrupt), the X-ray tube line, the microwave oven line, etc., which had been of inefficient production capacity *ab origine*, were all written off at once as scrap. It was not that they were obsolescent as a result of having been shut down pending the bankruptcy proceedings. They were obsolescent due to prior industrial and technical reasons. An attempt was made to salvage the TV cathode ray tubes line, and the line producing microwave tubes for military use. The first was a failure, and the second was successful thanks to considerable intervention.
>
> The cathode (picture) tube line was organized using absolutely outdated technology, and it manufactured products that were completely useless on the market. These were black and white 23" picture tubes that were totally unsaleable on the Italian market in those years. And they were made using glass from Russia, with absolutely prohibitive transportation costs to Palermo, as one can well imagine. Since the technology then being used was no longer sound, an attempt was made to negotiate to be able to continue using RCA technology. But even this attempt proved negative.
>
> It was not enough to change the technology: it was necessary to start *ex novo*, with huge new investments to cater for the demand of a market that was now moving towards colour TV. ELSI's commercial network was almost non-existent, and it had a bad commercial image.
>
> The microwave tube line was continued, because the prospects existed for the products to be absorbed on the market, providing work for a few dozen members of the company's 1,000-plus workforce.
>
> But it became necessary to renegotiate the assistance contracts with Raytheon, in order to be able to obtain the technical information and updates

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[1] For the whole text of the Affidavit, see Counter-Memorial, doc. No. 44.

> needed, in view of Raytheon's extremely, and quite unjustifiably, high royalties. After a short time, it became clear that this attempt could not proceed further, and it became necessary to think about starting up work on completely new products that would enable the company to retrain several hundred workers for new jobs.
>
> 3. The stocks were not able to cover even the cost of managing them. The stores were full of unsaleable picture tubes, above all, and old, wholly unusable materials that were for the production lines that were going to be sold off as scrap.
>
> 4. Through ELTEL S.p.A., which it controlled, SIT-Siemens had to invest over Lire 4,000,000,000 immediately in order to buy up Raytheon at the judicial bankruptcy auction held on 12 July 1969.
>
> It later had to invest about 3,500 million between 1969 and 1972 to restructure the plant, general facilities, and the machinery and production lines, and to retrain the workforce.
>
> 5. ELTEL then moved the production of the electronic parts of the power units for the telecommunications facilities from Aquila to Palermo, at the former ELSI factory. The only way to keep the local jobs was to rebuild the whole factory, in practice, because as Raytheon had left it, the factory was absolutely useless in technical and production terms, and had only been taken over as a bankrupt concern on purely social grounds."

> ". . . *(e)* the ELSI company was lacking not only in industrial features but also with regard to its commercial functions. Among other things the oversized work force meant prohibitively high costs, such that the products, which were in any case delicate, were not competitive on the market; *(f)* the only real advantage ELSI had was its work force, even though it was too large for a company of that size. The work force appears to be technically well trained (although not everyone agrees with this: see Ing. Busacca)[1], and this explains why someone ultimately purchased the company in question. However, the existence of well-trained labour is not enough to render an off-market company attractive."

Furthermore, the company had ceased to be a going concern directly because of the ELSI management. The halting of the production lines took place in early March 1968[2]. Therefore, when the events lamented by the Applicant Government took place, ELSI was no longer a functioning company. Thus, the hypothetical orderly liquidation would therefore have involved not a company that was operating somehow or other, but the remains of a structure which had proved so uneconomical as to have been already closed down. All that was worth keeping, was the work force which the ELSI management had already proceeded to dismiss and who saw their jobs disappear.

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[1] Counter-Memorial, doc. No. 144.

[2] See the dismissal letter addressed to the employees of ELSI, dated 16 March 1968 (doc. No. 21) and to Ing. Busacca (doc. No. 22). It would be appropriate to point out here that a partial — and regretfully unfruitful — effort to make ELSI operative again was carried out by the Mayor of Palermo himself, through the assignment — conferred upon Ing. Laurin, an ELSI senior company director — to direct and take care of the plant during the requisition. This remark, already made at pp. 9 and ff. of the Counter-Memorial, is ignored in the US Reply.

12.1 ELSI's Requests for Benefits to Which It Was not Entitled

One further consideration is to be added. Again in its Reply the Applicant Government complains of the failure to grant benefits that were promised (it is not clear when or by whom), for which it blames the Italian Republic.

The truth of the matter is that either ELSI was entitled by law to such benefits, in which case it should have taken legal action if they were withheld (but this was not the case and ELSI did not in fact take any action), or it was not, as we shall now proceed to demonstrate; in the latter case, the only alternative was for ELSI to request that benefits to which it was not entitled be granted out of "benevolence". This is what ELSI asked, receiving the refusal that anyone requesting an illegal favour should expect to get.

Even for the type of production concerned, ELSI was not entitled to such benefits.

The Applicant complains of the failure to apply to ELSI's favour Article 1 of Law No. 835 of 6 October 1950 according to which the State Administration was under an obligation to reserve the "supplies" of materials provided for in legislative decree No. 40 of 18 February 1947 to existing industrial facilities in the *Mezzogiorno* (Southern Italy). In particular, according to Article 16 of Law No. 717 of 26 June 1965, in force at the time of the events, the Government was supposed to reserve 30 per cent of its supply contract for companies operating in the *Mezzogiorno*[1].

Under Italian law the supply contract is a contract by means of which one party (in the present case, the Government) purchases goods or services, on a continual basis, from another party for its own use and (in the case of the public administration) to carry out its statutory tasks. This means that the materials in question have to be purchased ready for use immediately, without requiring any further assembly or conversion. This obviously did not apply to ELSI's products, since they were simple components and not finished products, and were therefore of no use at all to the Government, who would have had to sell them to other companies to be assembled and used in different products. This is not allowed by Italian law, since it would mean that the Government would in some way act as a "go-between" between private companies.

It is for these reasons, which are seen to be based purely on legal provisions and do not include any intention to harass ELSI, that the Italian Government could not grant the benefits requested, as also Minister Andreotti pointed out in his speech in Parliament of 25 July 1968[2].

Again with reference to the benefits extended under Italian legislation to companies operating in the Mezzogiorno, the Applicant notes that also other norms involving special freight discounts for materials used or produced by such companies were not applied to ELSI.

However, also, the above norms were not applicable to ELSI's products, and for the same reasons previously outlined.

Article 15 of Law No. 717 of 26 June 1965 and the respective ministerial decrees implementing it, both dated 29 March 1967, provided for benefits in the following cases:

(*a*) raw materials and semi-finished products to be used for production purposes;
(*b*) building materials, machinery and anything else required for the reconstruction, transformation, extension and modernization of industrial plants;
(*c*) transport outside southern Italy of *finished* products.

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[1] The texts of the relevant rules are reproduced in doc. No. 34.

[2] See Memorial, Ann. 46.

Raytheon requested precisely the application of the benefits provided for in section *(c)* above, since, as was stated also in the Memorial, the size and weight of the products meant high freight costs.

However, as can be seen from the text of the provision, the only and decisive condition for its application was represented by the fact that the products concerned were *finished* products and therefore required no further assembly. This was not true in the ELSI case.

Therefore, it was not possible to grant even this benefit to ELSI.

It was therefore not that the Italian Government caused damage to ELSI but rather that ELSI was demanding benefits from the Italian Government in the form of "aid" beyond what it was legally entitled to. After realizing that it had made a bad investment and that it had mismanaged it, Raytheon in other words did its best to pin the cost of all its own mistakes on the Italian Government. To try and achieve this it exploited the need, which was particularly strongly felt in Italy at the time, to protect jobs. Failing to attain this objective, the decision was taken to close down the plant, an act which was also in line with the policy of general reduction of United States investments abroad.

13. The Terms of the Sale

The Applicant Government contends that "either as a total package or individually to maximize the realizable price"[1], "each product line could be sold as a separate package, including the respective technology, contracts, customer and supplier bases, and established name and reputation to buyers elsewhere in Italy, Europe or Japan"[2]. This inference is drawn by the Applicant Government from the Affidavit of Mr. Scopelliti. But what prospects could there have been for such a badly structured plant, production lines resulting in such large failures, products of such little worth that they were often returned to the seller (and in any case had no market appeal), technologies that proved to be so inefficient as to bring criticism also from the Bankruptcy Court expert Dr. Mercadante? In order to be able to reason from inferences, such as the likelihood of selling ELSI as a going concern[3], the inferences must be based on adequate premises. Otherwise they may turn out to be purely gratuitous. In the case in point, the necessary premises are not to be found, because the poor industrial performance resulting in the ELSI debacle, the production and marketing deficiencies observed, the structural shortcomings found in the plant, all add up to an overall picture of the Palermo plant such as to render improbable any course of action other than to sell the plant as a whole.

14. IRI's Role in the Acquisition of the Plant

In the light of what has been seen above, it has little meaning to speak of IRI's interfering with the bankruptcy proceedings. It is easy to prove the inaccuracy of the contentions presented by the Applicant Government in this context[4].

IRI was established by R.D.L. (royal-decree law) No. 5 of 23 January 1933, converted into Law No. 512 of 3 May 1933[5]. It was subsequently modified by R.D.L. No. 905 of 24 May 1937. An institution was set up, whose action would be directed mainly towards the technical, economic and financial reorganization of national industrial activities.

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[1] See the Reply, p. 367, *supra*.

[2] Memorial, Ann. No. 17.

[3] Reply, pp. 368 ff., *supra*.

[4] See Memorial, I, pp. 58 ff.

[5] See doc. No. 31.

IRI became a public agency with a permanent structure, which was given the task of managing the shareholdings in its possession, of undertaking new industrial ventures, also in co-operation with private capital, and of carrying out initiatives in the field of vocational training.

The Institute's activity has therefore to be set in the broader framework of State holdings, i.e., of publicly owned shareholdings in profit-making companies.

It is true that IRI enjoys financial independence, having its own "endowment fund" (Art. 18 of the statute as approved by decree-law No. 51 of 12 February 1948)[1]. It directly owns the shares that it possesses, which differs from the case of the direct participation of the State, which become part of the latter's assets. IRI operates in accordance with the profitability criteria typical of a market economy. It has its own organizational structure, consisting of a President, a Vice-President, a Director-General, a Board of Directors, and a Board of Auditors.

In other words, the IRI group comprises a group of companies, which operate in accordance with the laws of the free market.

The "social" side of State holdings comes from the special attention focussed on the creation and preservation of jobs. However, the purpose of IRI is neither to salvage lame companies (for this purpose there is another agency in Italy, GEPI, for those cases in which the salvaging of a lame company presents particularly important social aspects) nor to engage in initiatives according to choices made by public authorities. Only occasionally IRI participated in the acquisition of unprofitable companies, acting on the instructions of the Italian Government.

In the telecommunications sector the IRI companies are grouped under STET, a joint-stock company quoted on the Milan Stock Exchange. Finmeccanica, with whom ELSI had meetings at the time it was seeking an Italian partner, is not a "division" of IRI, but a joint-stock company which, like STET, is wholly subject to the norms regulating private companies, and is quoted on the stock exchange.

Raytheon had already contacted IRI at a time when ELSI had not yet met its inevitable doom. However, IRI was not, and could not, be interested in entering into partnership with a company in such disastrous conditions. Subsequently, when deadlock was reached in the ELSI bankruptcy proceeding, IRI was obliged to intervene, mainly to safeguard employment and the situation of the Palermo workers who had been thrown out of their jobs.

The heart of the matter remains the question of whether the ELSI company was worthless or not. We have seen that the company had no value. This explains why the attempts by the political authorities, especially the local authorities, to find ways and means of salvaging it were unsuccessful. The cost of possible comprehensive solutions for running an obsolete plant was obviously too high for an organization that must compete according to the rules of the market. The formula of the sale of ELSI as a going concern is constantly repeated by the Applicant Government. The Reply goes as far as to state that, while the Italian Government had publicly announced its intention to purchase ELSI, ELTEL, an IRI subsidiary, "boycotted the first three bankruptcy auctions, seeking to buy only some of the assets at a lower price"[2]. However, this is contradicted both by the facts of the present case and by other events in which IRI has been involved.

Certainly, ELSI was of no interest to IRI as it was. This was confirmed by the fact that, after the purchase, ELTEL had to spend large amounts — as much as

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[1] See doc. No. 28.

[2] Memorial, I, p. 58.

Lire 3,500,000,000[1] — to restructure the plant and completely change its production, even transferring to it some production lines which were previously operating elsewhere. After its purchase by ELTEL, the ELSI plant was converted for the production mainly of electronic control panels, a production line that was removed from the SIP plant in L'Aquila[2]. So IRI and its subsidiaries operating in the sector were in no way attracted by a "going concern" which, as has been shown, was not a going concern at all. What they actually purchased was the site on which the ELSI plant was located, taking over its oversized but qualified work force. It is therefore pointless to claim now that IRI plotted and conspired to obtain the production lines, which were dismantled, sold for scrap and replaced by others, or to obtain the technology, which was not used because, as well as obsolete, it was not relevant to the industrial aims then actually pursued. It is thus not surprising that IRI and STET were reluctant to take over a plant which they, like everybody else, knew to be useless as a specific operating structure and in the predictable need of productive reorganization.

Furthermore, if ELSI had been, if not an "industrial jewel", at least something with some market appeal, as the Applicant Government is now claiming, why was it that no bidder came forward, particularly when the bankruptcy auctions were deserted? The Reply uses the term "boycotting". IRI, however, has never had such powers. Recently, for instance, one of the IRI sectoral leader companies, Finmeccanica, which as we have seen was previously involved in discussions with ELSI, had to negotiate the reorganization of the Italian thermo-engineering sector with other entrepreneurs. As the newspapers reported, Finmeccanica and its subsidiary Ansaldo missed the boat: Franco Tosi and Asea Brown Boveri deemed it preferable to come to an agreement between themselves and to leave the State holding companies out of the new organization. No-one therefore stood in the way of other entrepreneurs plucking the ELSI apple if they had a mind to, just as no-one prevented Franco Tosi (a membeer of the Pesenti group) and Asea Brown Boveri from reaching an agreement cutting IRI out of the thermo-engineering sector[3]. In the case of ELSI, the absence of competitors wanting to buy the alleged "industrial jewel" cannot be ascribed to boycotting by IRI, which in any case has never been proved. It was much more simply due to the easily understandable fact pointed out earlier, i.e., that no-one wanted the Palermo plant, either as a whole or in part. And to tell the truth, no evidence has even been produced of anybody else's interest being boycotted. What is true is that the bankruptcy auctions fall into line with what has already been demonstrated: ELSI was not a going concern but a ruined company, which nobody wanted. And when the group leader STET was obliged to intervene in order to save the jobs of the now unemployed ELSI work force, ELTEL had simply to make the best of a bad bargain.

15. Concluding Remarks

In actual fact the criticisms advanced by the Applicant Government are based on even more complicated considerations and use a rhetorical trick that can easily be exposed. Anyone reading the documents presented to the Court, starting with the latest one, can see that the Reply practically takes for granted what is set out briefly in the Memorial and explained at greater length in the 1974 Claim. In other words, by no longer going into the facts in detail, an attempt is made to give the impression that the alleged facts are obvious. On the contrary, these are merely assertions, or inferences, which are wholly unproven and actually do not stand to reason.

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[1] See Affidavit of Ing. Ravalico, doc. No. 14.

[2] See the Affidavit of Ing. Ravalico, doc. No. 14, and more generally, the Affidavit of Ing. Cammarata, doc. No. 13.

[3] On these facts and in particular on the disappointment of IRI for the agreement it failed to reach, see the article published in *Il Sole — 24 Ore*, 3 October 1987, doc. No. 29.

The 1974 Claim devoted considerable space (26 consecutive pages)[1] to describing, without proving, as must again be emphasized, a basically fraudulent plan to acquire the allegedly valuable ELSI plant at below its fair market price.

The contention of the United States Government is based on the following premises: the alleged existence of a sort of plot hatched by State holding companies, the Mayor of Palermo, banks and the bankruptcy receiver, focused on a valuable company, that IRI managed to acquire in an underhand way. As has been pointed out above, no such valuable company existed and therefore the hypothesis cannot be true. But the logical and legal coherence of the entire argument is also open to criticism.

The sequence of events that emerges from the outline of the facts contained in the 1974 Claim is as follows:

* on realizing that it lacked the capacity to attain a competitive size on the market, ELSI started looking for a possible Italian partner;
* IRI was approached, but was not interested;
* the banks, controlled by IRI, refused the proposals made by Raytheon and the ELSI management;
* the Mayor of Palermo issued the requisition decree;
* the bankruptcy trustee leased the plant to an IRI controlled company;
* an IRI subsidiary, ELTEL, purchased the plant after forcing the price down.

However:

(a) the need to find a strong partner is the first clue to the fact that ELSI by itself was not capable of attaining a competitive size. The tone used in the Applicant Government's Reply was one of substantial reproach to the Italian Government and IRI for not having rushed to ELSI's aid. No-one appears to have explained, however, why this should have been done, or, if it was true that ELSI was a valuable company, for which compensation is now being demanded, why the participation of a third party, i.e., of the State holding companies, was being begged;

(b) IRI's refusal was explained at the time by its lack of interest in investing in a company with a production like ELSI's; and in fact, when ELTEL, an IRI subsidiary, did purchase the company from the bankrupt's estate, it immediately set about changing the production lines[2];

(c) the banks' refusal to accept an "orderly liquidation" which would halve their credits is presented as an irrational and in any case spiteful attitude on their part, and basically attributable to IRI, by whom it is assumed that the banks were controlled, and through it, by the Italian Government. However:

(c1) when a debtor offers to pay only a part of his debts, he is the one who is normally reproached and not the creditor who refuses the deal. Furthermore, under the Italian Civil Code (see Art. 1181)[3], the creditor is entitled to refuse partial payment;

(c2) not all the banks to which ELSI owed money are controlled by IRI, which in its turn cannot be portrayed as an agent of the Italian Government, so

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[1] See Counter-Memorial, Unnumbered Documents, Vol. I, p. 233, *supra* [pp. 41-67].

[2] See the Affidavit of Ing. Ravalico, doc. No. 14.

[3] For the English text of Article 1181, see doc. No. 16.

that the link between the behaviour of the banks to which the money was owed and the Mayor or the Prefect is non-existent; in this case it is hard to see what the Applicant Government has to complain about;

(d) in Italy there is the separation of powers, especially between the judiciary and the executive. Therefore, to assume that there could be a concerted attitude between the receiver appointed by the bankruptcy court, the Mayor of Palermo, and IRI is not only a contemptuous argument vis-à-vis the Italian judiciary, but also an argument quite out of place.

In all probability the matter is much simpler than the highly imaginative version served in the Memorial and Reply of the Applicant Government. The Respondent could simply rest its case on the statement that the Applicant Government has produced no evidence of linked behaviour, and linked unlawfully, between companies, local authorities and judges. And in view of the seriousness of such a charge, reasonable caution should be exerted when asserting that such links existed. However, the facts alleged have induced the Italian Government to go beyond a mere passive denial of the Applicant's arguments and to stress the enormity of the allegations.

ELSI was an unsuccessful deal, at least from 1962 on, or rather an unsuccessful speculation, because Raytheon believed it was possible to make a profit by shelving the State and local authorities with the costs of an obsolete company, thereby exploiting the need to create jobs in the *Mezzogiorno*[1]. According to Ing. Busacca, ELSI did not distinguish itself either for its technology, nor for the state of its plant. According to Rag. Ravalico, its products were obsolete and off market. According to Dr. Mercadante, ELSI's products were defective. According to its balance sheets, the company was undercapitalized. Obviously all it produced were losses, and more losses.

It was the obvious concern of the Italian local and central authorities to provide the maximum possible employment. In high unemployment areas like the *Mezzogiorno*, the closing of a company normally gives rise to tension and a necessary degree of solidarity. Raytheon was ready to take advantage of all this, both at the beginning, when it benefited from financial inducements, and in the end, when the wages of its 168 employees were paid by the Sicilian Regional Government. As part of the general pressure applied to save the company Raytheon contacted IRI. However, in view of the economic uselessness of the ELSI plant, IRI made the correct managerial decision not to have anything to do with it, fully aware that once it was caught up in the affair it would have trouble coming out of it unscathed. Raytheon then made another attempt using an illusory rehabilitation plan in which it claimed that the banks were prepared to accept 50 per cent payment. However, to anyone examining the matter thoroughly, it was clear that no such conclusion was warranted since the ELSI plant had no market value except on the scrap market (and most of the plant was actually sold off as scrap)[2] while no commitment to "cover" ELSI was forthcoming from the parent company (since the promises mentioned by the Applicant Government are only hypothetical). With no further hope of *(a)* receiving Government orders, as no reason exists for giving them to a company that produced badly, *(b)* of association with the State holding system, which had no reason to waste its money on a company that produced losses, and *(c)* of an agreed rehabilitation plan, which was intrinsically unfeasible and in any case involved cuts in the creditors' share which the creditors would have no reason to accept, particularly since in Italy the bankruptcy proceeding is required by law: Raytheon stiffened its attitude in the hope that the State holding companies or the local political authorities would give in at the last moment (the payment of the wages of 187 employees by the Sicilian Region raised hopes of a possible bail-out)[1]. ELSI issued a communiqué, which was given wide circulation, to the effect that, as from 16 March 1968, the company would cease all activities and that as from 29 March the employees would be laid off. It is interesting to note the tone of the ELSI communiqué: it said in effect that Raytheon had invested many billion lire, and that the Italian Republic did not intend to mount any rescue operation. The only thing it omitted to communicate, and indeed tended to ignore, was the fact that the company was economically worthless and financially ruined, and that the Italian legal system does not consider that an insolvent debtor has the right to receive aid from anybody, particularly when he is responsible, as ELSI was responsible, for having wasted someone else's money (see the financing received) in products capable of making only losses.

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[1] Therefore, for instance, ELSI benefited from soft loans, which were provided for in the law; see Counter-Memorial, pp. 4 and 7, *supra*. The Reply, however, avoids any mentioning of these soft loans.

[2] See Affidavit of Ing. Ravalico, doc. No. 14.

As was to be expected, the ELSI work force staged several demonstrations[2]. On 25 March a general strike was actually called in Palermo to express solidarity with the ELSI workers. The local authorities were thus obliged to intervene. Raytheon, realizing that it now had the opportunity to blame others, and not its own errors, for the company's debacle, decided to speculate on the events. This was the beginning of the complaints.

It may be objected that this is only surmise. If it is, it is no different, however, from the surmise contained in the contentions of the Applicant Government, except for some fundamental aspects: the constant losses incurred by ELSI, out of all proportion to the capital invested, are an unchallenged fact; the ruinous state of the ELSI company is an unchallengeable fact, since it can be worked out from the figures and from the proposal to pay 50 per cent to the creditors; the state of obsolescence of the plant is equally unchallengeable, as it is confirmed in several Affidavits. The fact is therefore that ELSI and Raytheon were aware of the disastrous situation of the company and of the impossibility of presenting to the market a company that was losing money so fast. And yet, despite these facts, one still finds a request for compensation of a "full value" that has no connection at all with reality.

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[1] On the attitude showed by ELSI's management in those critical days, see the article published in *L'Ora*, doc. No. 29.

[2] On this point, see also the Affidavit of Avv. Maggio, doc. No. 3.

PART II. THE JURISDICTION OF THE COURT

Since the two Parties expressly agree that the Court has jurisdiction over the dispute, under Article XXVI of the Treaty, "in so far as it relates to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement"[1], it is hard to see why the Applicant finds it expedient to point out that "the Respondent is now barred from raising an objection"[2]. Over many years of negotiation on the claims put forward by the United States Government on behalf of Raytheon and Machlett, no intention of raising an objection to the Court's jurisdiction with regard to an application based on the Treaty has ever been voiced by the Italian Government.

The Respondent Government only expressed the view that, given the new position taken by the United States Government on many issues in its Memorial, the Italian Government would have been entitled to insist that "the basic contentions concerning the interpretation or the application of the Treaty should have first been put forward in diplomatic negotiations"[3]. However, as the Counter-Memorial made clear, "in the interests of a complete settlement of the dispute, the Defendant Government refrains from putting forward" any request for the Court "to declare that the conditions set forth in Article XXVI of the Treaty have not been fulfilled"[4].

There is little accuracy in the Reply's contention that "the United States has repeatedly raised with the Respondent since 1972 the legal claims now before this Court"[5]. As a perusal of the Memorandum of Law presented in 1974 and of the Memorial shows[6], the Applicant Government has significantly altered its basic contentions concerning the Treaty and the Supplementary Agreement. This may be an embarrassing fact for the Applicant Government to acknowledge; it cannot be denied by noting that the same Government has persistently claimed compensation[7].

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[1] Counter-Memorial, p. 26, *supra*. In quoting this passage the applicant Government's Reply (at p. 373, *supra*) omits the words "in so far". The omission may be inadvertent, as the jurisdiction of the Court over the dispute clearly rests only on Article XXVI of the Treaty, which reads as follows: "Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, when the High Contracting Parties shall agree to settlement by some other specific means."

[2] Reply, p. 373, *supra*.

[3] Counter-Memorial, p. 26, *supra*.

[4] *Ibid*.

[5] Reply, p. 373, *supra*.

[6] See Counter-Memorial, p. 26, *supra*.

[7] The Reply (p. 373, *supra*), concludes as follows: "Since the Respondent has consistently refused to pay compensation for the damages suffered by the United States, the dispute has not been satisfactorily adjusted by diplomacy and is now properly before this Court pursuant to Article XXVI of the Treaty."

PART III. THE ADMISSIBILITY OF THE CLAIM

The Italian Government has contended in its Counter-Memorial that "the United States Government's claim is inadmissible in view of the fact that local remedies were not exhausted by the two United States corporations on behalf of which the claim is put forward"[1]. The Applicant Government attempts to justify the admissibility of its claim in its Reply[2]. However, the United States Government does not contest that the objection that local remedies were not exhausted may be made in relation to a claim under the Treaty. It is also common ground that, in order to establish whether local remedies have been exhausted, "the only possible test is to assume the truth of the fact on which the claimant State bases its claim"[3].

One of the Applicant Government's contentions is that "the Respondent is estopped from asserting that there exists any requirement to further exhaust local remedies"[4]. It is difficult to see on what basis the existence of an estoppel could be alleged. At no time did the Italian Government say that local remedies did not have to be exhausted. Nor could a waiver be implied in the alleged fact that "the Respondent made statements that it was willing to go to arbitration with the United States"[5]. Objections relating to non-exhaustion of local remedies have frequently been considered on their merits in arbitration decisions over claims put forward by a State against another State on behalf of individuals. As the Arbitral Tribunal said in the *Case concerning the Air Services Agreement of 27 March 1946 (United States v. France)*,

> "the rule of international law relating to the requirement of exhaustion of local remedies, when making a distinction between the State-to-State claims in which the requirement applies, and claims which are not subject to such a requirement, must necessarily base this distinction on the *juridical* character of the *legal relationship*, between States which is invoked in support of the claim. Consequently, with respect to the applicability of the local remedies rule, a distinction is generally made between 'cases of diplomatic protection' and 'cases of direct injury'[6]."

Moreover, far from being an unexpected issue, the question of exhaustion of local remedies had been discussed at length in the Memorandum of Law submitted by the Applicant Government in 1974[7]. It was reasonable for the same Government to take into account the fact that the issue would have to be considered in arbitration or judicial proceedings. The Defendant Government's constantly expressed view that the claim is unmeritorious certainly does not affect the application of the local remedies rule. As the arbitrator noted in the *Finnish Shipowners* case,

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[1] Counter-Memorial, p. 27, *supra*.

[2] Reply, pp. 374-377, *supra*.

[3] This passage, taken from the arbitral award in the *Ambatielos* case (12 *Reports of International Arbitral Awards*, p. 119), was quoted in the Counter-Memorial, p. 28, *supra*; the Reply, p. 374, *supra*, nt. 2, refers to the pages of the award containing the same passage.

[4] Reply, p. 376, *supra*.

[5] *Ibid.*, p. 377, *supra*. The Reply, p. 377, *supra*, also criticizes the Respondent for having failed to "suggest or request that Raytheon and Machlett enter Italian courts and sue on the basis of the Treaty". Does this imply that, according to the Applicant, a State is under an obligation to recommend legal action against itself?

[6] Decision of 9 December 1978, 54 *International Law Reports*, pp. 304 ff., at p. 324.

[7] Unnumbered Documents submitted by Italy, Vol. I, pp. 264-267, *supra*.

> "every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court[1]".

The Applicant Government seeks support in the circumstance that "assuming for the sake of argument that an action based on the Treaty could be brought — the statute of limitations on that action has now expired"[2]. It is hard to see why the said circumstance should be relevant, as it is well known that the local remedies rule fully bars an international claim when local remedies which have not been exhausted become unavailable: the arbitration award in the *Ambatielos* case[3] provides a good example to this effect. In any case, the five-year deadline set by Article 2947, paragraph 1, of the Italian Civil Code[4] for claims relating to damages arising out of a wrongful act had already elapsed for any act committed in 1968 by the time the United States Government submitted its claim on 7 February 1974 on behalf of Raytheon and Machlett[5]. Therefore, any attitude that the Italian Government may have taken after that date can in no way be considered as the cause of the remedy not having been exhausted.

The very attempt to build an argument of estoppel on such a slender basis conveys the impression that, even in the Applicant Government's view, there are no substantial reasons for overcoming the objection to the admissibility of the claim. The objection rests on the fact that Raytheon and Machlett — apart from not taking adequate steps to prevent some of the measures that the Applicant Government assumes to be wrongful[6] — failed to bring an action against the Italian State claiming compensation for damages arising from the alleged wrongful acts committed by public authorities. The general rule in the Italian Civil Code concerning compensation for damages arising from wrongful acts — Article 2043[7] — is often invoked by individuals against the Italian State and substantial sums have been awarded to the claimants where appropriate. In the present case — if one assumes, as one is supposed to do under the local remedies rule, that the Applicant Government's contentions are correct — Raytheon and Machlett suffered damages caused by Italian public authorities in violation of the Treaty and the Supplementary Agreement: the provisions of the Treaty and the Supplementary Agreement would have made it necessary for an Italian court to conclude — on the basis of the same assumption — that the Italian public authorities' acts were wrongful acts when applying Article 2043 of the Civil Code[1].

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[1] Also this passage, which is taken from 3 *Reports of International Arbitral Awards*, p. 1503, was quoted in the Counter-Memorial, pp. 27-28, *supra*. The Reply, p. 374, *supra*, nt. 2, again refers to the pages of the award containing the same passage.

[2] Reply, p. 377, *supra*.

[3] See 12 *Reports of International Arbitral Awards*, p. 118.

[4] Under the said paragraph the deadline is five years from the day on which the wrongful act took place ("The right to compensation for damages arising from a wrongful act expires five years after the day in which the wrongful act took place").

[5] Unnumbered Documents submitted by Italy, Vol. I, p. 232, *supra*.

[6] For instance, Raytheon failed to appeal to the Court of Cassation against the decision by the Court of Palermo of 20 June 1969 concerning the terms of the fourth auction, while Machlett does not appear to have taken any steps to challenge the bankruptcy judge's decision.

[7] "*Compensation for wrongful acts.* Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those damages" (the Italian text with full translation is reproduced in doc. No. 16).

With regard to the claim for compensation of damages arising from wrongful acts, which is available under Article 2043 of the Italian Civil Code, it is to be pointed out that Raytheon and Machlett, if convinced that the behaviour of Italian officers (the Mayor, the Prefect of Palermo, etc.) had been inspired by an intent of jeopardizing their interests in favour of IRI, could have also brought a criminal action against such authorities, in compliance with Article 323 of the Italian Criminal Code ("Innominate abuse of power") (see doc. 17). This criminal action, if successful, would also have implied, in favour of Raytheon and Machlett, a right to compensation, under Article 2043 of the Italian Civil Code (in the Italian legal system, damage caused by a crime always gives rise to the right to compensation according to Article 185 of the Criminal Code).

In other words there were two avenues available to the United States shareholders for seeking compensation: a criminal suit coupled with a civil suit or an independent civil suit.

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both allowing the shareholders to invoke Article 2043 of the Civil Code.

The different opinions given in the affidavits submitted by the Applicant (p. 278, *supra*), except for several incorrect premises on which they are based (e.g., on p. 15 of the La Pergola opinion it is taken for granted that the requisition would have continued, which it did not; on p. 16 the Prefect of Palermo is said to have made a statement concerning the cause-and-effect relationship between requisition and bankruptcy which he never made and whose existence has never been proved) do not consider that, when a shareholder, as has been alleged in the present case, has suffered not only indirect damage resulting from damage inflicted to the company, but is instead the direct victim of a persecution by public authorities which causes him an immediate, personal and direct damage, he is entitled to compensation under Italian law.

In such a case, and irrespective of his nationality, any such shareholder can bring an action for damages against the public official responsible for such action, as well as against the branch of the public administration on behalf of which the latter was acting.

[1] In addition to the remedies referred to above, there were other remedies provided for by the Italian legal system and available to the two United States companies. Such remedies are offered by the bankruptcy legislation in favour of all the creditors of the bankrupt company.

(a) Raytheon was in fact a chirography creditor of ELSI for the sum of Lire 1,143,800,000 (see Memorial, **I**, p. 108 and Ann. 14), in addition to the sums guaranteed and paid as guarantor. However, this credit was never claimed in the bankruptcy proceedings (see Memorial, Ann. 26, **I**, pp. 238-239 and Ann. 30, **I**, p. 252) upon recommendation of the Raytheon counsel, who was obviously well aware of how much below the triumphant forecasts the true value of the bankrupt company's assets really was.

(b) As for the complaints about the unfavourable conditions in which the ELSI sale took place (the absence of any foreign companies at the auctions and the general complaints about "irregularities") that the allegations are groundless and the bankruptcy proceedings took place in full respect of Italian law.

However, it is a general principle of Italian bankruptcy legislation (Arts. 23 and 26 of the Bankruptcy Law: text reproduced in doc. 18) that all the acts of bankruptcy judges can be appealed against by petition to Courts, whose decisions can be reviewed by the Court of Cassation, according to Article 111 of the Italian Constitution. In fact most of the decisions of the bankruptcy judge were not appealed against and in any case the judicial review of the Court of Cassation was never asked for.

(c) With regard to the specific terms of the sale, Article 108 of the Bankruptcy Law states that they are set by the bankruptcy judge at the receiver's request and that the sale may be suspended when the price offered is much lower than the market price. In the case in point it was apparently not considered necessary to use these powers of suspension.

However, it is legally unchallengeable, and therefore an applied principle in the Italian legal system, that the sale order issued by the bankruptcy judge, who thereby obviously deems it not necessary to exert the powers of suspension, can be appealed against in a court of higher instance and, eventually, in the Court of Cassation.

The deadline for lodging an appeal is quite adequate and in any case such as to guarantee the right of defence of the parties concerned. The deadline is represented by the order transferring the assets to the purchaser, and is obviously subsequent to the date of the auction at which they were sold.

The appeal can be made by any of the parties interested in the correct conduct of the bankruptcy proceeding and in obtaining the highest possible proceeds from the sale. The two parties specifically concerned are the receiver and the bankrupt.

However, anyone, even third parties who are not involved in the proceeding but who consider that the auction price is too low with respect to the value of the assets, can make an appeal or request the suspension of the sale, even after the auction has been held.

No set of facts similar to that to which the United States Government's application refers was ever invoked before an Italian court. The receiver, when he brought an action for compensation[1], only complained of the requisition decree[2]. Nor did he invoke — or indeed could have invoked, as he was acting on behalf of ELSI, an Italian company under Article II, paragraph 2, of the Treaty — any provision in the Treaty or the Supplementary Agreement. Hence, the receiver's action can in no way justify the lack of initiative on the part of Raytheon and Machlett.

In order to contend that there were no local remedies available to Raytheon and Machlett the Applicant Government refers to three opinions: two given to Raytheon in 1971 and the third one, which is dated February 1988, given to the United States Government by Professor Elio Fazzalari, who had acted over 13 years as Raytheon's counsel in relation to the claim — a fact which is mentioned neither in the opinion annexed to the Reply nor in the Reply, but results from documents exhibited by the Applicant Government[3]. The two earlier opinions did not deal with the question of whether the Treaty could be invoked by Raytheon and Machlett before Italian courts. The Reply's assertion[4] that Professor La Pergola "considered in 1971 whether Raytheon could sue based on the Treaty" is unsound, not only grammatically. Professor La Pergola's opinion is a discussion of diplomatic protection of shareholders. In the English translation annexed by the Applicant Government to its 1974 "Memorandum of Law", the only argument given in the opinion with regard to local remedies runs as follows:

> "The bankruptcy status prevents any direct initiative by the company towards reintegration or restoration in a situation in which it would have found itself had it not been for the illicit action. On the basis of the principles confirmed by internationalistic jurisprudence, this constitutes another element permitting immediate protection of the shareholders by the State of which they are citizens. Hence, the question of exhausting internal remedies does not apply which remedies, in this situation, would not have been directly available to the shareholders. The latter have suffered a specific injury of their interests since the illegal conduct of the State made the liquidation impossible[5]."

On the basis of Professor Fazzalari's "independent" opinion, the Applicant Government puts forward only one argument in order to contend that the Treaty would have been of no avail to Raytheon and Machlett. The argument runs as follows:

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provided that they do so before the transfer order is issued. They are entitled to do this irrespective of whether they are willing to make a higher offer or whether they are reporting irregularities in the proceeding.

In the case in point, Raytheon made only a few, unsuccessful, appeals to the lower court and never went as far as the supreme Court of Cassation.

[1] Raytheon's counsel Giuseppe Bisconti argued in 1971 that there was no cause of action under Article 2043 of the Civil Code because "Italian law provides for a specific remedy against the requisition which is the aforementioned appeal to the Prefect" (Unnumbered Documents submitted by Italy, Vol. I, p. 278, *supra* [p. 160]). However, the receiver brought precisely such an action which was partly successful. The final decision in this case was given by the Court of Cassation on 26 April 1975. For the English translation of the decision, see Memorial, Ann. 82.

[2] For an English translation of the receiver's lawsuit see Memorial, Ann. 79.

[3] See Memorial, Ann. 13 (Schedule K) and Ann. 40 (Exhibit A).

[4] Reply, p. 375, *supra*.

[5] Unnumbered Documents submitted by Italy, Vol. I, p. 278, *supra* [p. 172]. The English translation of the full opinion has been omitted in Annex 3 to the Reply.

> "Although the Treaty and Supplement at issue here were incorporated into Italian legislative acts, the provisions argued before this Court are not complete enough to permit a suit for compensation by a United States national against the Government of Italy in Italian courts[1]."

In other, and perhaps simpler, words, the United States Government's contention is that Italian courts would have ignored all the provisions in the Treaty and the Supplementary Agreement which could have been invoked by the two United States companies notwithstanding the existence of specific legislation designed to ensure the application in Italy of the Treaty and the Supplementary Agreement[2].

The Reply does not quote, directly or indirectly, any single case in which Italian courts would have taken the view that any provision in the Treaty or the Supplementary Agreement is not self-executing. The Applicant Government attempts to diminish the importance of what the Reply calls the "only Italian case cited by the Respondent in support of its argument"[3]. This was a decision by the Italian Court of Cassation[4] in which Article V, paragraph 4, of the Treaty, which had been invoked before the Italian courts by a United States corporation, was applied to its benefit. The Reply's comment that there "were no damages awarded in that case"[5] is misleading, since no damages had been claimed; nor is the observation that the case "did not involve the Government of Italy"[6] any more pertinent: when a treaty provision is regarded as self-executing in the relations between private parties, it is certainly applied also in a case brought against public authorities.

The Italian Court of Cassation confirmed its attitude in favour of considering the Treaty provisions as self-executing when it applied Article XIV of the Treaty in a criminal case, *In re Walsh*[7]. In Italy, as the claimant Government rightly noted in another context[8] "[a]lthough the opinion of the Supreme Court is not binding outside the case in which it is rendered, it is highly persuasive authority in subsequent cases in Italian courts". Hence, the two decisions by the Court of Cassation mentioned above give a strong indication of what would have been the attitude of Italian courts if Raytheon and Machlett had brought a claim and invoked provisions in the Treaty and the Supplementary Agreement.

An attitude in favour of the self-executing character of treaty provisions was shown by the Italian Court of Cassation also when individuals invoked, in cases brought against public authorities, provisions of treaties like GATT which were taken not to be self-executing by some non-Italian courts. For instance, Decision No. 1455 of 21 May 1973, *Ministero delle Finanze* v. *S.p.A. Manifattura Lane Marzotto*, held that Article II *(b)* of GATT

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[1] Reply, p. 375, *supra*.

[2] The two legislative acts which provided the relevant "implementing orders" *(ordini di esecuzione)* were referred to in the Counter-Memorial, p. 28, *supra*.

[3] Reply, p. 376, *supra*.

[4] Decision No. 2228 of 30 July 1960, *The Durst Manufacturing Co.* v. *Banca Commerciale Italiana*. The text of this decision, to which the Counter-Memorial referred on p. 28, *supra*, is reproduced in doc. No. 11.

[5] Reply, p. 376, *supra*.

[6] *Ibid*.

[7] Decision No. 2579 of 6 December 1983-17 February 1984, *Commissione Tributaria Centrale* (1984), II-1143, reproduced in doc. No. 12.

[8] Reply, p. 376, *supra*, nt. 6.

> "is immediately applicable, without the need for further legislative intervention, not only to the participating State but also to the subjects of the internal system, which gives rise directly to rights and obligations[1]".

The Reply[2] referred to a decision concerning Article 78, paragraph 4, of the Peace Treaty with Italy, which concluded that "the said Article constitutes a relationship enforceable in internal law"[3]. With regard to the same provision, in Decision No. 107 of 14 January 1976, *Ministero del Tesoro* v. *Mander Brothers Ltd.*, the Supreme Court stated that the said paragraph,

> "in providing that the Italian Government be charged with the obligation to indemnify citizens of the United Nations for losses suffered, from wartime events, following injury or damages caused to their property in Italy, gives rise, along with an international obligation of the Italian State vis-à-vis the other Contracting States, to a direct legal relation of a binding character, between the first State and the individual citizens of the United Nations. Such relation, complete in all its essential elements, is immediately effective in the domestic legal system, without the further requirement of a normative act of integration or of implementation, and therefore, as was pointed out by the *Sezioni Unite* of this Supreme Court, it is actionable by the same citizens before Italian courts[4]".

This reasoning hardly supports the Applicant Government's assertion, with regard to the Treaty that

> "although there is provision in Article V for indemnification by the Government of Italy of those individuals or corporations who have been deprived of their property, that Article is still not sufficiently complete[5]".

The Reply's further contention that

> "since Raytheon's and Machlett's claims are those of shareholders, Italian law would prevent a suit seeking compensation based on the illegal requisition because Italian law reserves such a right to ELSI alone, despite the existence of the Treaty[6]",

is an inaccurate rendering of Professor Fazzalari's "independent" opinion to which it refers: the final part of the opinion, in which the argument was put forward, was written on the basis of "[h]aving excluded that the treaty has introduced into the internal law claims and judicial remedies stronger and different from those already available in the Italian legal system"[7]. Hence, this argument, whatever its merits, in no way affects the question whether the Treaty could be invoked before Italian courts.

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[1] 96 *Il Foro Italiano* (1973), I-2444. English translation in 2 *The Italian Yearbook of International Law* (1976), pp. 383 ff., at p. 384. See doc. No. 5.

[2] Reply, p. 375, *supra*, and nt. 4.

[3] Decision No. 3592 of 13 November 1974, *Ministero del Tesoro* v. *Di Raffaele*. English translation in 2 *The Italian Yearbook of International Law* (1976), pp. 366 ff., at p. 368.

[4] 99 *Il Foro Italiano* (1976), I-2463. English translation in 3 *The Italian Yearbook of International Law* (1977), pp. 349 ff., at pp. 349-350. See doc. No. 4.

[5] Reply, p. 375, *supra*. Under Italian law, the fact that in some instances there may be a doubt as to whether a remedy exists before an ordinary court or an administrative court never implies that no remedy exists or that a provision in a treaty may be taken as not being self-executing. The decision quoted at note 3, *supra* was in favour of the competence of ordinary courts. No doubt, also a claim for damages under Article 2043 of the Civil Code should be brought before an ordinary court.

[6] Reply, p. 375, *supra*.

[7] *Ibid.*, Ann. 2, Part II.

The Counter-Memorial quoted a decision by the United States Court of Appeals for the Fifth Circuit, which held that the treaties of Friendship, Commerce and Navigation "are self-executing treaties"[1]. The Applicant Government has in no way challenged this appraisal of the attitude of the United States courts towards treaty provisions whose language is identical or similar to that of the provisions which could have been invoked before Italian courts. Nor has the Applicant Government given any compelling reason why Italian courts should have disregarded these provisions. The decisions quoted above point, on the contrary, to an attitude which is certainly not less favourable to the self-executing character of treaty provisions. Thus, Raytheon and Machlett, in seeking immediate recourse to diplomatic protection[2], did not use the local remedies available to them, as they were required to do under the local remedies rule. As was said by Mr. Becker, the Agent for the United States Government in the *Interhandel* case:

> "Even if by violation of a treaty an international wrong would have been committed, that wrong still would not be sufficiently definite and complete so as to give rise to a claim between States. In order to give rise to an international claim a treaty violation must have become definite and complete; it must have passed beyond the stage where domestic judicial action of a country can rectify the violation[3]."

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[1] The reference to the decision in *Spiess* v. *Itoh and Company*, 643 *Federal Reporter*, 2d Series, pp. 353 ff. (1981) was made in the Counter-Memorial, p. 29, *supra*, nt. 1.

[2] The request for an opinion on the admissibility of diplomatic protection (Unnumbered Documents submitted by Italy, Vol. I p. 278, *supra* [p. 161]) shows where their main objective was as early as 1971.

[3] *I.C.J. Pleadings, Interhandel* case (*Switzerland* v. *United States*), p. 505.

PART IV. THE INTERPRETATION AND APPLICATION OF THE 1948 TREATY AND THE 1951 SUPPLEMENTARY AGREEMENT

1. Aims Pursued by the 1948 Treaty and Principles on Which It Is Based

In Part Five of the Reply, in which the legal basis of the claim of the United States is examined, some remarks are addressed in the first place to the question of the aims characterizing the Treaty of Friendship, Commerce and Navigation of 2 February 1948. The Italian Counter-Memorial[1] had stressed the importance that the object and purpose of a treaty have in the interpretation of its provisions in accordance with Article 31 of the Vienna Convention on the Law of Treaties[2]. The Counter-Memorial emphasized the great variety of aims pursued by the 1948 Treaty and showed that the provisions to which the Applicant refers cannot be interpreted solely as a function of the interests of United States investors in Italy.

In fact, as the Applicant asserts in its Reply, the Treaty provisions show that "both Parties were concerned with the property and interests therein of each Party's corporations in the territory of the other"[3]. However, for this very reason it is essential to ascertain accurately the extent to which the above-mentioned provisions refer to the property and interests owned by the Raytheon and Machlett corporations in Italian territory.

A further preliminary question is that of the principles on which the 1948 Treaty is based[4]. The Applicant argues that the principles of national treatment and of most-favoured-nation treatment are not the only ones applied in the Treaty[5]. This is not a pertinent criticism of our reasoning which consisted in pointing out that these are the only two principles explicitly mentioned in the Preamble to the Treaty[6]. The Applicant itself referred to an earlier case in which the Preamble was used by the Court to establish the object and purpose of a treaty[7]. This does not imply denying that "[t]he operative standard of treatment must be analyzed for each of the articles advanced by the United States"[8]. However, one should not neglect the significance of the phrase "in conformity with the laws and regulations in force", which qualifies the standard of treatment provided for in several articles of the Treaty.

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[1] Counter-Memorial, pp. 30-31, *supra*.

[2] The Counter-Memorial, on p. 30, *supra*, noted that "[a]lthough the 1969 Vienna Convention on the Law of Treaties does not apply to the interpretation of the Treaty and its Supplementary Agreement, the rules on interpretation included in the Convention are to be considered as corresponding to those applicable under general international law". This appears to be common ground between the Parties, as in the Reply the "United States agrees that the rules of the Vienna convention apply to the interpretation of this Treaty" (p. 384, *supra*, nt. 1).

[3] Reply, pp. 378-379, *supra*.

[4] See Counter-Memorial, pp. 34-36, *supra*.

[5] Reply, p. 379, *supra*.

[6] Counter-Memorial, p. 34, *supra*.

[7] Reply, p. 379, *supra*, nt. 2.

[8] *Ibid.*, p. 380, *supra*.

2. The Italian Nationality of ELSI

A fundamental problem is related to the status of the ELSI company, i.e., of the entity that, having decided to cease its activities, had its plant and equipment requisitioned and was subsequently declared bankrupt at the request of its management, its plant finally being sold. In this connection it has been pointed out in the Counter-Memorial[1] that, in accordance with Article II, paragraph 2, of the Treaty, ELSI, having been incorporated in Italy under Italian law, is an Italian company, notwithstanding the fact that in 1968 all its shares were owned by the United States companies Raytheon and Machlett. In view of its nationality, therefore, ELSI was not eligible for protection under the 1948 Treaty and the 1951 Supplementary Agreement between Italy and the United States with reference to its activities in Italy and the events concerning it which occurred in Italy. In this regard the Counter-Memorial cited the decision of the Supreme Court of the United States in the case of *Sumitomo* v. *Avigliano*[2]. In accordance with the Treaty of Friendship, Commerce and Navigation between the United States and Japan (in which Art. XXII, para. 3, corresponds to the above-mentioned Art. II, para. 2, of the Treaty between Italy and the United States), the Court ruled that since the Sumitomo Company was incorporated in New York under New York law "it is a company of the United States, not a company of Japan", and therefore could not "invoke the rights provided in Article VIII, paragraph 1" of the Japan-United States Treaty.

With regard to this case the Applicant only asserts in a footnote[3] that the argument presented by the United States before the Supreme Court in the case of *Sumitomo* v. *Avigliano* is not relevant to the present case since it "dealt with language particular to Article VIII (1) of the FCN Treaty". It is easy to reply, however, that the only argument of the United States mentioned by the Italian Government in its Counter-Memorial[4] was drawn from the brief submitted to the Supreme Court by the United States as *amicus curiae*, and consisted in the observation that, in accordance with the Treaty with Japan, "a company has the nationality of its place of incorporation". This obviously results from Article XXII, paragraph 3, and not from Article VIII (1) of the said Treaty. Anyway, what really matters is the passage taken from the Supreme Court's decision: the Applicant is referred to the quotation on page 36, *supra*, of the Counter-Memorial which was summarized above.

Certainly, Article II, paragraph 2, of the 1948 Treaty represents a provision which is very clear and cannot be ignored. Consequently, the heart of the matter is to establish whether — given the fact that ELSI was not eligible by nationality to invoke the Treaty with regard to Italian authorities, any rights and interests of the two United States shareholders in ELSI, namely, Raytheon and Machlett, are "specifically protected" by the provisions of the Treaty referred to by the Applicant, as is asserted by the latter. On principle, it is possible that certain provisions of an international bilateral instrument may be intended to protect specific rights or interests of the shareholders in a company. This was recognized by the Court in the *Barcelona Traction* case[5]. While the Applicant cites this well-known precedent[6], it fails to acknowledge that the Court's decision stressed the firm distinction between the company's rights and those of its shareholders[1]. This distinction was based on the nature of corporations' stock under domestic law: which was considered to be relevant also in international law in so far as the latter makes reference to the "rules generally accepted by municipal legal systems which recognized the limited company whose capital is represented by shares"[2]. *Inter alia*, the Court Stated that . . . "even if a company is no more than a means for its shareholders to achieve their economic purposes, so long as it is '*in esse*', it enjoys an independent existence"[3].

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[1] Counter-Memorial, pp. 36-37, *supra*.

[2] See *ibid.*, p. 36, *supra*.

[3] Reply, p. 380, *supra*, nt. 1.

[4] Counter-Memorial, p. 36, *supra*.

[5] *I.C.J. Reports 1970*, p. 39, para. 58. See also p. 47, para. 90.

[6] Reply, p. 380, *supra*.

In fact this is the principle which, by means of provisions assigning the nationality of the companies to the one and to the other Party to the Treaty, is considered to be a fundamental starting point also by Treaties of Friendship, Commerce and Navigation. It is true that a small number of clauses adopt instead what the Court calls "the process of lifting the veil"; the Court stated that this process, "being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible *to play a similar role* in international law", with the result that "on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders"[4]. It is clear, however, that when certain clauses specifically protect the interests of foreign shareholders in a national company they must be interpreted restrictively and rigorously, as is in all exceptional rules[5]. The argument put forward by the Applicant according to which all the provisions of the 1948 Treaty and the 1951 Supplementary Agreements invoked by it are to be considered as instruments affording a wide range of protection for American shareholders of Italian companies does not appear to have any legal basis.

3. The Alleged Interference by Italy in the Management and Control of ELSI. Was Article III, Paragraph 2, of the Treaty Violated?

Let us now examine each of the claims advanced by the United States Government, in the order in which they appear in the Reply. The first wrongful act allegedly committed by the Respondent is to have interfered in the management and control of the ELSI Company. This alleged act would have taken place, according to the Applicant, first when it was decided to requisition the plant and equipment, further when the decision by the Prefect of Palermo on the ELSI appeal against the requisition order was delayed and, lastly, when the bankruptcy proceeding was thwarted. Italy is thus alleged to have violated Articles III and VI of the 1948 Treaty and Article I of the 1951 Supplementary Agreement.

Article III is divided into two paragraphs and there is no allegation that Italy did not comply witn the first of these paragraphs in the case in point. Therefore, the Applicant has implicitly admitted that the Raytheon and Machlett companies enjoyed the right of holding shares in ELSI under conditions no less favourable than those granted to companies of any third country. The Applicant implicitly recognizes also that ELSI, which was controlled by the said two United States companies, enjoyed the right to exercise the functions for which it had been created in conformity with the Italian law and regulations, upon terms no less favourable than those accorded to corporations controlled by corporations of any third country.

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[1] *I.C.J. Reports 1970*, p. 34, para. 41.
[2] *Ibid.*, p. 37, para. 50.
[3] *Ibid.*, p. 36, para. 45.
[4] *Ibid.*, p. 39, para. 58. Emphasis added.
[5] Counter-Memorial, p. 37, *supra*.

The dispute concerns paragraph 2 of Article III which the Applicant interprets as permitting the United States companies to organize, control and manage Italian commercial and industrial corporations subject only to the requirements established by Italian law. This right is alleged to have been violated by the requisition decree.

Such a contention is unfounded. First of all, with regard to the interpretation of the relevant section of Article III, paragraph 2, it was emphasized in the Counter-Memorial[1] that the right of United States companies to "organize, control and manage" corporations and associations in Italian territory has been granted by the Treaty "in conformity with applicable laws and regulations" in Italy; in other words, without prejudice to the powers granted by law to the Italian authorities. In its Reply the Applicant admits that "the way in which management and control may be exercised is subject to the regulation under local law", although it adds that "the right to manage and control may not be abrogated entirely regardless of the treatment accorded to Italian nationals"[2]. Furthermore, Article III, paragraph 2, is deemed to include "certain minimum standards of protection under international law, including protection from unlawful interference with management and control"[3].

It seems clear that the rights in question are granted within the framework of existing Italian legislation. In the case in point, the right to organize Italian corporations and associations does not appear to have been taken into consideration by the Applicant. This is explained by the fact that ELSI was already organized when the Raytheon and Machlett companies became its shareholders. Control and management are instead concepts that refer to all those powers which may be exercised by majority shareholders, as member of the company's Assembly: i.e., to elect the members of other company organs, to approve of the financial report, supervision of company management. In effect, all these powers were exercised by Raytheon and Machlett from the time they became majority shareholders of ELSI. And this has never been challenged with reference to the activity carried on by these companies in the period preceding the requisition. As to the later period, if it is admitted that management and control are protected by the Treaty in conformity with the applicable local laws and regulations, all the interference the public authorities may exercise under these laws and regulations must be deemed to be compatible with the degree of protection afforded under the Treaty. Indeed such protection cannot be considered to be extended to the point that the United States shareholders are exonerated from the application of imperative measures, which are binding for all subjects; some of these measures may have an effect on the powers to manage and control an Italian company. In this regard it should be noted that the Italian legal provisions on the basis of which the requisition decree of 1 April 1968 was issued without doubt pursues public policy aims and could be characterized as police regulations.

What must be ruled out anyway, is that Article III, paragraph 2, includes a minimum standard of protection as established by customary international law. No such standard is in fact provided by its paragraph 2. Moreover, it has been seen that general international law gives no protection to foreign shareholders in national companies (there is no need to make any further reference to the *Barcelona Traction* case). Furthermore, the Applicant itself asserts that the standard in question includes the "protection from unlawful interference with management and control"[1], and certainly not protection from interference based on local laws.

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[1] Counter-Memorial, p. 42, *supra*.

[2] Reply, p. 382, *supra*.

[3] *Ibid.*, p. 383, *supra*.

It remains to compare the fact which the Applicant alleges to be unlawful with the provisions of Article III, paragraph 2. In the Counter-Memorial it was firstly noted that the requisition decree of 1 April 1968 did not affect the shareholders' control of the ELSI company, but only the company's control of the requisitioned assets[2]. Secondly, it was pointed out that the effect of this decree was only to temporarily suspend, and not to curtail definitively, the company's control of the requisitioned assets[3]. Thirdly, it has been emphasized that the invalidity of the requisition decree, as ascertained by the decision of the Prefect of Palermo, does not alter the fact that it was issued by the competent authority on a regular legal basis[4].

The Applicant contends in its Reply[5] that only the United States companies which were ELSI's shareholders had the right to decide upon its liquidation, and that the requisition deprived all potential purchasers of access to the plant, thus making it impossible to sell it as a going concern. Furthermore, according to the Applicant, the illegitimacy of the requisition in so far as it was not capable of achieving the purpose declared by the Mayor of Palermo would mean that it was not in accordance with Italian law. Lastly, the alleged interference by the Italian Government in the bankruptcy proceeding further diminished Raytheon and Machlett's right to receive any of the benefits of a normal bankruptcy sale.

These contentions appear to be largely irrelevant and in any case groundless. The unlawful act alleged to have been committed by the Italian Government is to have prevented the United States shareholders from managing and controlling the ELSI company. It has already been explained that the requisition of the ELSI company was directed towards its plant and equipment, which thus became temporarily unavailable to the owner. At the same time, the United States shareholders continued to exercise management and control over the company. This is shown by the fact that they allowed the Board of Directors to file a petition for bankruptcy during the period that the requisition was in force.

There are two logical and legal flaws in the arguments advanced by the Applicant: the tendency to confuse the rights of the shareholders, which are protected by the Treaty, with those of the Italian company ELSI, and the tendency to present as effects of the requisition what were in actual fact effects of the bankruptcy. If these two flaws are removed, the situation becomes clear. In particular: it is true that the shareholders had the right to wind up the company, but it was the bankruptcy petition resulting from insolvency and not the temporary requisition, which prevented this right from being exercised. With regard to the right of access to the plant by potential purchasers, suffice it to say that until 30 September 1968 this entailed obtaining the approval of the custodians of the requisitioned assets, and after that date, of the Receiver in the bankruptcy proceeding: in either case, however, the latter were replacing ELSI's company officials and not its shareholders. As to the rights of the Raytheon and Machlett Companies to receive any benefit from the bankruptcy sale, these could come into being only at the end of the bankruptcy proceedings. They could have no possible relation with the right to manage and control ELSI. In any case, the

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[1] Reply, p. 383, *supra*, and nt. 2.
[2] Counter-Memorial, p. 43, *supra*.
[3] *Ibid.*
[4] *Ibid.*
[5] Reply, p. 381, *supra*.

"interference" by the Italian Government in the bankruptcy proceedings has not been proved.

Moreover, the temporary nature of the requisition cannot be overlooked when discussing the effects of the decree by the Mayor of Palermo on the availability of the requisitioned assets. The fact that these effects ceased on 30 September 1968 cannot be denied; it emerges from the text of the decree and was clearly taken by the Court of Palermo as one of the factors, when calculating the compensation to be paid to the ELSI bankruptcy Receiver. In its attempt to support its allegation that the requisition completely prevented the United States shareholders from managing and controlling ELSI, the Applicant has added to the requisition period that of the bankruptcy, without any concern for the fact that the latter was not caused by the Italian Government.

Finally, the circumstance that the requisition in question was considered to be illegitimate under Italian law does not produce a conflict between the said measure and the phrase "in conformity with applicable law and regulations" contained in Article III, paragraph 2, of the Treaty. As stated above, this phrase is used to impose a general restriction on the scope of the powers of managing and controlling Italian companies attributed to United States shareholders. Although the Prefect of Palermo ultimately quashed the Mayor's decree on the ground of its inefficacy in obtaining its stated purpose, the requisition was nevertheless the act of an authority duly empowered to take such a measure. In any case, Article III, paragraph 2, can certainly not be used to assert an obligation, under international law, for the Italian Government to respect the Italian laws governing requisition; the Italian Government is only under an obligation to recognize certain powers to foreign shareholders — in particular to manage and control Italian companies — within the framework of Italian legislation. Moreover, if it is correct that the requisition did not affect those powers, the issue of the specific relevance of the phrase "in conformity with applicable laws and regulations" cannot be of any use to the Applicant's assertion.

4. Was There a Violation of Article VII, Paragraph 1, of the Treaty?

It has already been recalled that, according to the United States Government, interference by the Respondent in the powers of management and control of ELSI held by the two shareholding companies allegedly violated Article VII of the 1948 Treaty, and paragraph 1 of this Article in particular. It was pointed out in the Counter-Memorial[1] that this provision grants to the nationals, corporations and associations of each Party the right "to acquire, own and dispose of immovable property or interests therein" in the territory of the other High Contracting Party, under condition of reciprocity. A preliminary objection addressed to the Applicant was that the ELSI plant belonged to ELSI, and certainly not to its United States shareholders; the only relevant assets possessed by the latter companies may be said to be the shares themselves.

The Applicant's Reply[2] is based on two points. On the one hand it points out that Article VII refers to "immovable property or interests therein", and asserts that the term "interest in property" is sufficiently broad to include also the hypothesis of property owned indirectly through a subsidiary company. Furthermore, the Applicant points out that even if Raytheon and Machlett could claim protection only for their shares, one should take into account the fact that their value was allegedly reduced to zero by the requisition.

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[1] Counter-Memorial, p. 41, *supra*.

[2] Reply, pp. 385-386, *supra*.

With regard to the first point it must be remarked that the terms contained in the English version of Article VII, paragraph 1, — "immovable property or interests therein" — corresponds in the Italian text to the words "beni immobili *o altri diritti reali*", thereby referring to the right of ownership of immovable property and to other absolute rights of a more limited extent. This must lead anyone interpreting them to exclude completely that the term "interests" can have in the Treaty the meaning attributed to it by the Appellant. The fact that Italian law does not recognize any "indirect" ownership of immovable property (of which the two United States companies would be the owners in the present case through an Italian subsidiary owned by them) leads to the conclusion that if the United States actually did intend, at the time of the 1948 Treaty, to protect property in the sense indicated by the Applicant, this intention did not emerge or prevail. This is shown by the difference observed in the two texts, which are equally authentic according to Article XXVII of the Treaty.

Therefore Article VII, by guaranteeing the availability to Raytheon and Machlett of immovable property *o altri diritti reali* in Italian territory, certainly protected the availability of the ELSI shares to them, but not that of the plant, of which the latter company was sole owner. As for the allegation that the market value of ELSI shares was reduced appreciably as a result of the requisition, it must be pointed out that the protection afforded to the United States shareholders under the 1948 Treaty could not be extended to the point of guaranteeing the market value of their investments!

5. . . . or of Article I of the 1951 Supplementary Agreement?

The alleged violation by Italy of the obligation to allow the United States shareholders of Italian companies to exercise the management and control of such companies is, according to the Applicant, an act which is incompatible also with Article I of the Supplementary Agreement of 26 September 1951 between the United States and Italy.

Under the provisions of this Article the nationals, corporations and associations of each Party "shall not be subjected to arbitrary or discriminatory measures within the territories" of the other Party whenever such measures would have the effect of: "*(a)* preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein". A different effect is considered in section *(b)*, but this will be discussed in the following paragraph. By requisitioning the ELSI plant, Italy is alleged to have violated the above-mentioned prohibition.

The first objection raised in the Counter-Memorial was that the requisition decree was addressed to the Italian company ELSI and not to its shareholders[1]. It was also pointed out that although the requisition temporarily deprived ELSI of the availability of the requisitioned assets (plant and equipment), it did not prevent management and control of the company from continuing to be freely exercised by the statutory company organs with regard to all aspects of management other than those requiring an immediate need to have access to the requisitioned assets[2]. The Applicant responded to these arguments above all by a dogmatic statement: "Raytheon and Machlett were most certainly 'subjected to' measures in Italy 'resulting in' the prevention of their effective control and management of ELSI[3]." With regard to the fact that the effective control and management continued to be exercised by the company organs even during the requisition period, the Appellant preferred to make the apparently ironical remark that "the company organs could still function, but there was nothing left for them to control and manage"[1]. What was within the functions of these organs and was in fact decided by them were two acts of considerable importance: the appeal against the requisition decree and the filing of the bankruptcy petition!

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[1] Counter-Memorial, p. 41, *supra*.

[2] *Ibid.*

[3] Reply, p. 384, *supra*.

In any case, even if the requisition measure adopted by the Italian Government had been addressed to the Raytheon and Machlett companies and not to the Italian company ELSI, it would have come under the provisions of Article I of the 1951 Supplementary Agreement only if it had had the characteristics of an "arbitrary or discriminatory" measure. In the Italian Counter-Memorial the interpretation of these two terms was discussed at some length[2]. It was pointed out that the term "arbitrary" only refers to a measure that is completely unjustified, which can be explained only as a means used by the authorities to damage and oppress a person subject to their power; subsequently, the term "discriminatory" was defined as covering any measure introducing an unfavourable distinction between the person to which it is applied and other subjects in a similar situation, for no other reason than to intentionally damage that person. The applicant replied that the arbitrary nature of the requisition in question is demonstrated by the fact that the Prefect of Palermo declared it to be illegitimate, on the grounds that any means that do not fit the expressed goal or are legally impermissible, or are allegedly arbitrary and unreasonable[3]. Furthermore, according to the Applicant, the requisition was discriminatory, because it was aimed at favouring an enterprise controlled by the Government[4]. The Italian Government insists on its point of view and will try now to illustrate it more fully.

A significant comparison can be made, as was already done in the Counter-Memorial, between the prohibition of "arbitrary or discriminatory measures" mentioned in Article I of the 1951 Supplementary Agreement between Italy and the United States, and the prohibition of "unreasonable or discriminatory measures" contained in other Treaties of Friendship, Commerce and Navigation stipulated by the United States (e.g., the Treaty with Ireland of 21 January 1950, Art. V; the Treaty with the Netherlands of 27 March 1956, Art. VI, para. 3). This points to a high degree of correspondence between the concept of arbitrary and that of unreasonable. But quite apart from this observation, the concept of "arbitrary measure" by the public authorities implies not only the absence of any reason, but the total lack of any justification and therefore the impossibility of including the act in any one of the categories adopted by the domestic legal system. Therefore, it is not enough for a measure to be illegal under such a system in order to be able to infer automatically that the measure is "arbitrary" in the light of an international treaty. It may well be that an act is formally illegal without being arbitrary. In the case in point, the requisition decree was quashed by the Prefect of Palermo on the grounds that it was not a suitable means of ensuring the safeguard of jobs for the ELSI employees. Nevertheless, common sense tells us that this does not make it an "arbitrary" act. The authority which issued the decree, the Mayor of Palermo, actually did have the power under Italian law to adopt emergency measures concerning private property[5]; he gave reasons for his decision and considered that the circumstances of urgency and serious public necessity existed. The legality of his behaviour under any of these aspects was not criticized or reviewed by the superior authority. On the other hand, the difficult situation to which the reasons for his action are related — a situation characterized by the dismissal of the work force, social unrest, the possible damage to the regional economy, substantial risk for law and order — seems to indicate that, despite the formal irregularity of an improper use of power, the requisition decree was not the result of any intention by the administrative authorities to harass ELSI (or its shareholders), but was instead justified by a number of circumstances.

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[1] Reply, p. 384, *supra*.

[2] Counter-Memorial, pp. 43-46, *supra*.

[3] Reply, p. 385, *supra*.

[4] *Ibid.*

[5] See Art. 7 of Law No. 2248 of 20 March 1865, Ann. E, Memorial, Ann. 34.

Last but not least, it is necessary to examine whether the measure in question can be considered discriminatory. It was already noted that, in the context of Treaties of Friendship, Commerce and Navigation, which are mostly based on the principle of national treatment, a discriminatory measure is essentially equivalent to a malicious distinction based on the nationality of the beneficiaries. According to McKean[1]:

> "the word discriminate alone is commonly used in the restricted sense of an unfair, improper, unjustifiable or arbitrary distinction, and it is this meaning that has come to be employed in international law".

The same author insists on the "special meaning" acquired by the term "discrimination" in international legal use, pointing out that "it does not mean any distinction or differentiation, but only arbitrary, invidious or unjustified distinctions". In the case in point, even if one assumed that the requisition had directly affected the United States shareholders, nothing authorizes one to believe that it may have implied the intention to apply a different and unfair treatment to the United States investors. It is recalled here that a large number of examples of the requisitioning of plants of Italian companies for reasons related to employment crises was mentioned in Part I of this Counter-Reply. On the other hand, the Applicant, realizing that it is impossible to assert that the requisition was "discriminatory" in the sense defined above, asserted the existence of discrimination in favour of the Italian company controlled by IRI, which purchased the ELSI assets at the bankruptcy auction. However, it seems unnecessary to dwell on this flight of fancy. It would mean that an alleged "plot" hatched by the Italian Government, the bankruptcy proceeding officials and the IRI group had already been arranged in view of depriving Raytheon and Machlett of their supposed technological jewel! Such a method of presenting the facts of the case is another clear example of the superficiality with which the Applicant has approached both the problem of the causal connection and that related to the notion of act of the State when speaking of the wrongful acts allegedly committed by Italy.

6. The Alleged Impairment by Italy of the United States Companies' Rights and Interests

The second act by the Italian Government deemed to have violated the obligations imposed on it by the 1951 Supplementary Agreement with the United States consists in the alleged impairment of the interests of the Raytheon and Machlett companies. This complaint is based on Article I of the Agreement, which has been examined above, with specific reference to Article I *(b)*. When read together, the provisions put nationals, corporations and associations of either High Contracting Party in a position not to be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party, resulting in impairing the *other* legally acquired rights and interests in the enterprises "which they have been permitted to establish or acquire herein" or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. The measure which the Applicant asserts to be incompatible with these provisions is again the requisition.

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[1] The meaning of discrimination in international and municipal law, in the *British Year Book of International Law*, 1970, pp. 177 ff.

The main objection to this contention consists in the remark that, if the requisition measure was neither arbitrary nor discriminatory, as the Italian Government submits, none of the provisions contained in the said Article can be applied to the present case. Moreover, the Claimant asserts that all the rights and interests impaired by the bankruptcy fall within the scope of the abovementioned Article I *(b)*. This makes it necessary to repeat once again that the bankruptcy, for which a petition was filed by ELSI, was not caused by the requisition. No proof whatsoever of a causal link has been produced by the Claimant because its argument is unfounded. In fact the bankruptcy was the result of ELSI's insolvency, which preceded the requisition. In any case, however, the action of the organs conducting the bankruptcy proceedings cannot be referred to the Italian Government, and this is even more true if one considers the actions of Raytheon's creditors! It is quite absurd that the Claimant should attempt to include within the scope of application of Article I *(b)* of the 1951 Supplementary Agreement, even the financial losses suffered by Raytheon in defending itself in the suit brought against it by the Italian banks to which it owed money!

7. The Alleged Italian Taking of Interests in Property of Raytheon and Machlett

According to the Claimant the third of the alleged wrongful acts by the Italian Government consists in the "taking of interests in property" to the detriment of the Raytheon and Machlett Companies. The provision invoked in this connection is Article V, paragraph 2, of the 1948 Treaty, with reference to paragraph 1 of the Protocol. Under Article V, paragraph 2, the expropriation of property belonging to national corporations and associations of either High Contracting Party within the territories of the other is inadmissible "without due process of law and without the prompt payment of just and effective compensation". The Protocol, which bears the same date as the Treaty, establishes in its first paragraph that

> "The provisions of paragraph 2 of Article V providing for the payment of compensation shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

In the Counter-Memorial three arguments have been clarified: firstly, that the effects of the requisition of ELSI assets were quite different from those of an expropriation; secondly, that on the basis of an interpretation which takes into account also the Italian text of the Protocol, the provisions of Article V, paragraph 2, shall extend to the *rights* and not to the mere interests of United States companies in property which is taken in Italy, lastly, that the Protocoi cannot be interpreted as giving to the assets of an Italian corporation controlled by United States shareholders the same protection as is granted to a United States corporation under Article V[1]. The Applicant's reply to these arguments may be summarized as follows: a taking of property is generally recognized as including not merely outright expropriation but also any unreasonable interference with the use, enjoyment or disposal of property; the English term "interests" properly reflects the meaning of "*diritti*" (and in any case the Protocol refers to interests held directly or indirectly by nationals, corporations and associations of either Party in property taken within the territories of the other Party); lastly, the standard of protection guaranteed by the Protocol is exactly the same as that provided by Article V, paragraph 2[1].

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[1] Counter-Memorial, p. 40, *supra*.

The three arguments outlined above may be further elaborated upon. It is a known fact that, in his decree of 1 April 1968, the Mayor of Palermo provided for "the requisition with immediate effect and for the duration of six months, unless further extended, and without prejudice to the rights of the parties and third persons" of the ELSI plant and equipment. The decree referred to Article 7 of Law No. 2248 of 20 March 1865, Annex E, as well as to Article 69 of the regional law governing local authorities (Decree No. 6 of the President of the Sicilian Region of 21 October 1955). It must be pointed out here that a temporary requisition is quite different from expropriation, while the Italian text of Article V, paragraph 2, of the 1948 Treaty only concerns "beni espropriati" (*expropriated* property) and "esproprio dei beni" (expropriation of property). Furthermore, under Italian law, Article 7 of Law No. 2248 of 20 March 1865, Annex E, empowers the administrative authorities to "dispose without delay of private property in the case of serious public necessity", while making no reference at all to expropriation (which is regulated by another legislative act — Law No. 2359 of 25 June 1865). In its turn, Article 69 of the Decree of 21 October 1955 of the President of the Sicilian Region empowers mayors to take the steps deemed necessary to cope with emergency situations, again without mentioning expropriation. Therefore, if the characteristics of the case in point are compared with Article V, paragraph 2, of the 1948 Treaty, taking into account the Italian text, it is clearly to be excluded that this provision applies to the temporary requisition of the ELSI assets.

Logically, in order to introduce a claim based on Article V, paragraph 2, the United States would have to assert that only the English text of the Treaty should be considered, and also that the expression "taking of property" has actually such an extension as to include a temporary requisition. However, the dominance of the English text is denied by the above-cited Article 27 of the 1948 Treaty, according to which the Italian and English texts are "both equally authentic". Under Article 33 of the Vienna Convention on the Law of Treaties this means that, except in the case of specific mutual agreement to the contrary, "the text is equally authoritative in each language". However, Article 33, paragraph 4, of the said Vienna Convention establishes that when the comparison of identical texts reveals a difference in meaning which cannot be removed by applying Articles 31 and 32, "the meaning which best reconciles the texts, having regard to the object or purpose of the treaty, shall be adopted". In the light of this principle the only way to reconcile the English and Italian texts of Article V, paragraph 2, of the 1948 Treaty, is that to assume that a taking of property under Article V, paragraph 2, must be considered to occur only when it possesses the characteristics of a definitive deprivation of property. In Italian, this characteristic is indicative of expropriation and is found in the majority of cases where a "taking of property" in a wider sense is involved. This would lead to the exclusion from the scope of Article V, paragraph 2, of all cases of any temporary requisition "in use" such as that applied to the ELSI assets on 1 April 1968.

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[1] Reply, pp. 388-389, *supra*.

However, even if one assumes that the use of the expression "taking of property" should be accepted (which would amount to subordinating the Italian text to the English text!), a requisition in use, which has the nature of a temporary form of government control over private property, could not be said to be equivalent in any case to a "taking of property" as set out in the English text of Article V, paragraph 2, of the Treaty between the United States and Italy. The vast amount of literature on the subject in English seems to indicate that the above-mentioned forms of control should rather be defined as "indirect takings"[1] and that only the interferences in physical property "which significantly deprive the owner of the use of his property" amount to a taking of that property[2]. One must rule out that an interference limited to six months, i.e., a short suspension of the availability of the assets, could be defined as a significant deprival of the owner's use of property.

In conclusion, there are good reasons for sharing the view expressed by the United States Arbitrator George Aldrich in the case *ITT-Islamic Republic of Iran*[3]:

> "while the taking of control over private property by a government does not automatically and immediately justify the conclusion that the property has been taken by the government . . . such a conclusion is warranted whenever events show that the owner was deprived of fundamental property rights and it appears that such privation is not merely ephemeral".

In the case in point, the deprival of the use of the ELSI plant for the duration of six months cannot be equated to the deprivation of fundamental property rights.

Certainly, the Mayor of Palermo was exercising a power granted to him for reasons of public necessity in order to remedy temporarily a situation of social unrest and to prevent disorders. In other words, he was using a regulatory power, more precisely a police power, and the exercise of such a power can hardly be assimilated to an expropriation measure[4].

In a study[5] based on practice, the following conclusion was reached:

> "A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue. But if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive."

Even in the case law of the United States courts, there are some precedents that are interesting in the present context. In particular it is worth referring again to a case concerning the seizure of a coal mine by order of the highest authorities of the executive power, *Pewee Coal Company* v. *the United States Government*[6].

In its judgment of 30 April 1951 on that case, the Supreme Court said:

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[1] See Rosalyn Higgins, "The Taking of Property by the State", in *Collected Courses of the Hague Academy of International Law*, 1982, III, pp. 322 ff.

[2] *Ibid.*, p. 324.

[3] This opinion, concurrent with that of the Tribunal, is cited by Swanson, "Iran-U.S. Claims Tribunal: A Policy Analysis of the Expropriation Cases" in *Case Western Reserve Journal of International Law*, 1986, p. 327.

[4] *Ibid.*, p. 334.

[5] See Christie, "What Constitutes a Taking of Property under International Law", in the *British Year Book of International Law*, 1962, p. 338.

[6] See Part I, nts. 2 and 3, p. 428, *supra*.

> "Where President issued Executive Order directing Secretary of Interior to take immediate possession of all coal mines in which a strike or stoppage has occurred or was threatened, and to operate or arrange for operation of such mines, and the Secretary of Interior issued order for taking possession of mine and required mine officials to agree to conduct operations as agents for the government, there was a 'taking' of private property for public use with the meaning of the Fifth Amendment."

Thus, noting that there had been a strike, which had stopped the normal operation of a coal mine, the judgment stressed the fact that the order was justified by public use, that is to say, by a motive which is equivalent to the public purpose which justified the requisition decree adopted by the Mayor of Palermo on 1 April 1968.

In his concurring opinion in the same case, Judge Reed said that,

> ". . . the relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties (. . .) may be subjected to public operations *only for a short time* to meet war or *emergency needs*, and can then be returned to their owners".

About the issue of compensation to be attributed to the owners, Judge Reed, after considering the uncertainty of the measure of market value, concluded that: "The reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case."

Account should also be taken of a case decided on 29 April 1952 by the United States District Court in the *Youngstown Sheet and Tube Company* v. *Sawyer (Secretary of State for Commerce)* and others, in which an Executive Order issued by the President of the United States related to a dispute between a number of steel producing companies and their work force. The judgment noted that the dispute had not been settled by means of collective bargaining, or as a result of the efforts of the Government, and that the workers had therefore gone on strike. The Court also recalled the reasons underlying the President's Executive Order, stating, *inter alia*: "In order to ensure the continued availability of steel it was necessary that the United States take possession of and operate the plants." Another reason underlined the gravity of the situation, in that

> ". . . The breakdown of collective bargaining negotiations created an immediately impending national emergency because interruption of steel manufacture for even a brief period would seriously endanger the well-being and safety of the United States in a critical situation."

Thus, even if one assumes the requisition of the ELSI plant a taking of property, one could not deny that it was fully justified under the circumstances.

8. Discrepancy Between the English and Italian Texts of Article V, Paragraph 2, of the Treaty

Another problem arises, as it was previously noted, out of the discrepancy between the English and Italian texts of paragraph 1 of the Protocol of the 1948 Treaty in which the provisions of Article V, paragraph 2, are extended "to the rights *(diritti)*" (in the Italian text) or to the interests (in the English text) held directly or indirectly by nationals and corporations or associations of either Party in property taken in the territories of the other Party. Also in this case reference has already been made to Article 33 of the Vienna Convention on the Law of Treaties from which the conclusion was drawn that only the more restrictive meaning corresponding to the Italian text may be taken as reconciling both texts. The Applicant has stressed that also the rights *indirectly* held by nationals of either Party are protected under the Protocol and considered that the United States shareholders in question held "indirect rights" over the ELSI plant, which could therefore be taken by Italy only *in* conformity with the provisions of Article V, paragraph 2. However, under Italian law, the shareholders can hold rights only towards the company and have no rights on the assets of the latter. The international significance of the distinction between the rights of a company and the rights of its shareholders appears to be supported by the above-cited *Barcelona Traction* judgment. "Indirect" rights of shareholders in a company can only be those which will accrue at a later step, for instance, after the company has been wound up, when the compensation initially granted to the company accrues to those who were shareholders in it. This is related to the interpretation of paragraph 1 of the Protocol as a norm essentially governing the payment of compensation for expropriated property; indeed, reference is made in the text to the provisions of Article V, paragraph 2, "which provide for the payment of compensation".

Nor can it be said that the provisions concerning the property of United States companies in Italy, contained in Article V, paragraph 2, can be extended to the United States shareholders of the Italian companies controlled by them. This does not amount to a discussion of the level of protection granted by the Protocol, which explicitly extends certain provisions of Article V, paragraph 2. It is an assertion that the owners of rights over the property taken, which are protected by paragraph 1 of the Protocol, do not include the United States shareholders of controlled Italian companies, but only refers to United States nationals, corporations and associations holding rights over the taken property other than ownership (e.g., usufruct). In other words, it is anything but certain that paragraph 1 of the Protocol is one of the rules intended to "lift the corporate veil" of an Italian company to which the taken property belongs. In any case, this is by no means explicitly provided for.

It should also be noted that no investigation of the conditions prescribed by Article V, paragraph 2 ("due process of law and prompt payment of just and effective compensation") was made in the Counter-Memorial for the simple reason that the plant requisitioned belonged to ELSI, which, as is known, was of Italian nationality and therefore not entitled to any protection for its property in Italy under the Treaty. Even if one assumed that they were recognized under paragraph 1 of the Protocol, the only relevant rights of the United States shareholders would concern the payment of compensation for the "expropriated" property. The advent of the ELSI bankruptcy after the requisition also had the effect that the compensation for damages awarded by the Court of Appeal of Palermo (in replacement of the compensation for the requisition of the plant) was paid to the bankruptcy receiver.

9. The Alleged Failure by Italy to Provide Protection and Security for ELSI

The last of the four unlawful acts for which the Respondent was allegedly responsible has been defined by the Applicant as "failure to provide protection and security", with reference to Article V, paragraph 1, and Article V, paragraph 3, of the 1948 Treaty. Paragraph 1 guarantees the protection and security of nationals and their property of either Contracting Party in the territories of the other Party. It also guarantees full protection and security as provided for under international law (with reference to property, these guarantees are extended from the nationals to corporations and associations). Paragraph 3 repeats the promise of protection and security with respect to the matters enumerated in paragraphs 1 and 2 "upon compliance with the applicable laws and regulations" under conditions of reciprocity and most-favoured-nation treatment. The facts which, according to the Applicant, denote the violation of these norms by the Italian Government were essentially the occupation of the plant by the work force and the Prefect's delay in upholding the appeal made by ELSI against the requisition decree[1]. But in addition to these two circumstances, the Applicant also again raises the issue of the requisition, which referred to "the entire entity of ELSI". Furthermore, he complains in this respect of the failure to protect ELSI because "the property of Raytheon and Machlett in Italy was ELSI itself"[2].

In the Counter-Memorial it was already pointed out that the occupation of the ELSI plant by the work force began prior to the requisition[3] and that the Prefect's delay in rendering his decision on the appeal against the requisition lies totally outside the scope of Article V, paragraphs 1 and 3[4]. It was also pointed out that Raytheon and Machlett have no right to complain of any failure to protect ELSI and the ELSI plant because ELSI was an Italian company and the plant belonged to it[5]. In its Reply the Applicant argues that paragraphs 1 and 2 of Article V (referred to in para. 3) guarantee the protection and security of "persons and property", and not of immovable property[6]. This is correct, but is here irrelevant (also because it is obvious that immovable property represents a category of property). What does appear relevant and therefore must be repeated, is that, in the present case, the protection and security provided for in Article V, paragraphs 1, 2 and 3, could only refer to the property of the United States companies Raytheon and Machlett in Italy, but that this property obviously did not include ELSI or the equipment and plant of this separate corporation entity.

In conclusion, the reference to Article V, paragraphs 1, 2 and 3, in the case in point does not add any further arguments to the Applicant's defence. It may therefore be replied simply that the protection and security of the Raytheon and Machlett Companies, and of the property they possessed in Italian territory (i.e., money and ELSI shares) are basically extraneous to the subject of the present dispute.

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[1] Reply, p. 390, *supra*.
[2] *Ibid.*, p. 391, *supra*.
[3] Counter-Memorial, pp. 15 and 39-40, *supra*.
[4] *Ibid.*, pp. 17 and 39-40, *supra*.
[5] *Ibid.*, p. 39, *supra*.
[6] Reply, p. 391, *supra*.

PART V. ISSUES RELATING TO THE CLAIM FOR REPARATION

1. The Admissibility of the Request for Reparation

The Italian Government's Counter-Memorial highlighted the entirely subsidiary character of the comments expressed by the Respondent in relation to the claim for reparation advanced by the United States Government[1].

The Applicant takes for granted, in Part VI of the Reply, the responsibility of the Italian Government for its alleged "wrongful conduct", and therefore asserts to be entitled to compensation "in the full amount of the losses" resulting from that conduct[2].

On the contrary, the arguments put forward by the Respondent justify the assertion that no violation of the 1948 Treaty and of the 1951 Supplementary Agreement was committed by Italy with regard to the requisition of the ELSI plant, the bankruptcy requested by ELSI and its final liquidation; therefore, no reparation is due for the losses suffered by the United States shareholders of ELSI. This explains what was defined as the subsidiary nature of the Respondent's comments about reparation: they are made for the hypothesis that the Applicant's point of view would be accepted by the Court.

2. Decisions Handed Down by the Italian Courts

In the Italian legal system, an issue of compensation for damages resulting from the requisition was raised by ELSI and was settled by a judgment of the Palermo Court of Appeal, dated 24 January 1974, which was confirmed on a further appeal by the Court of Cassation[3]. As it was stressed earlier, the requisition decree of the Mayor of Palermo (1 April 1968) was appealed against by ELSI (on 19 April 1968), with the result that the Prefect of Palermo, by a decision of 22 August 1969, declared the decree to be illegitimate, because it did not fit the goal pursued[4].

In this regard, it must be underlined that the requisition decree only referred to the plant and the equipment belonging to ELSI, and not to the company as a whole. This is relevant, because it explains that the judgment of the Court of Appeal of Palermo could not, and at all events would not have been permitted to make a global assessment of the state of the company taken as a whole: in fact the claim submitted to the Court referred to a decree whose content was clearly defined.

Furthermore, it was logical that when establishing the amount of compensation, the Court should have worked on the basis of the value attributed to the assets by the Technical Consultant appointed by the receiver in bankruptcy. This value amounted to Lire 4.560.588.440[5].

Using this value as a parameter, the Court calculated the damages occasioned to the company over the six-month period during which the requisition decree was in force to be Lire 114,014,711. This was based on a rate of 5 per cent of the aforementioned value throughout the said period, plus interest accruing from 1 October 1968 when the requisition had ended.

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[1] Counter-Memorial, p. 47, *supra*.

[2] Reply, p. 392, *supra*.

[3] Memorial, Anns. 81 and 82.

[4] See *ibid.*, Ann. 81, **I**, p. 385.

[5] *Ibid.*

3. Unlawful Conduct by the State and the Obligation to Make Reparation for any Damage

It was recalled from the outset of this Rejoinder, that no claim for reparation would have been advanced, unless a direct link is demonstrated to exist between the alleged wrongful act and the alleged damage, to the effect that the former was the cause of the latter. On the contrary, the foregoing account of the facts summarizing the dispute clearly shows that the conduct attributed to the Italian Government does not appear to be the cause of the alleged damage. The first conclusion to be drawn is therefore that these facts or acts — mainly the requisitioning of the ELSI plant, then the bankruptcy and the resulting liquidation — cannot be deemed to have given rise to responsibility on the part of the Italian Government, and to its alleged obligation to make reparation to the Government of the United States.

On this subject, there is a principle which is inherent in the general theory of responsibility, in domestic as well as in international law: the principle of causality. To be able to impute responsibility to a person or corporation, it is not sufficient that that person performed a specific action and that damage subsequently occurred. It is also essential to show that the action itself actually caused that damage. This is not merely a logical requirement, but a practical need, which is recognized and affirmed in municipal and international judicial practice.

There are quite numerous cases in which judicial decisions have stated that the causal relationship between a wrongful conduct and the damage is the essential condition for responsibility, and hence for the obligation to indemnify the injured State.

Examining the concept of causality has sometimes led the courts to see whether, in individual cases, the causality was adequate to justify a claim for reparation. The practice of adequate causality is based on the following consideration: only those conditions which made the damage probable, and hence attributable to the agent, at the very moment they came into being, may be considered as conditions of the damage. The adequate causality criterion is mainly applied in complex cases, where the judge has more freedom to evaluate the facts. It seems to be particularly appropriate for clarifying the many elements that are involved in the present case.

The Respondent certainly shares what the United States Memorial states[1], relying on the doctrine it refers to there (Reuter, Yntema): ". . . the injury for which reparation is due is that which is tied by a chain of causality to the wrongful act." But, this obviously implies that damage which is not tied by an adequate chain of causality with a wrongful act attributed to a State cannot justify a claim for reparation against that State.

4. Causality Nexus and the Measure of Reparation

About the measure of the reparation claimed for the alleged unlawful acts attributed to Italy, the United States Reply adds nothing particularly new, and mainly restates the argument set out in the Memorial. With reference to the "duty to pay", in particular, the United States do no more than restate general principles, almost as if they were applicable without taking into account the specific facts of the present case.

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[1] Memorial, I, p. 106.

According to the Reply, it is an established principle of international law that "... damages should be awarded ... to compensate for all losses or injury caused by a State's wrongful acts"[1]; the conclusion is drawn that "... [a]ll of the injuries suffered by Raytheon and Machlett should be included in the measure of compensation"[2]. But it is an equally unchallengeable principle of international law that an injury shall be linked in some way to an act of the State having violated an international obligation — and the violation shall be proved as existing and attributable to that State — in order to entitle the injured State to reparation. As was stated by Anzilotti[3],

> "[on] the basis of the principle that in order to claim compensation for an injury, the injury must be the result of an unlawful act, it is necessary to see whether the causality relationship exists and the relevance of it in conjunction with the other causes".

In any case, it is essential to demonstrate that there exists a sufficiently close cause-and-effect relationship between the act alleged to be at the origin of the obligation to indemnify and the injury itself.

The international judicial practice is firm in excluding the obligation to make reparation for an injury that has not been "prouvé avoir été une conséquence réelle et inévitable"[4] of the injurious act, or when the latter act "was not in legal contemplation the proximate cause of such a damage"[5].

To more accurately appraise the United States claims and the specific aspects of this case, it is certainly an interesting exercise to recall some of the grounds on which international courts have ruled that a sufficient causality nexus between the alleged damage and a State's unlawful (or allegedly unlawful) act did not exist.

One of these reasons is that the act attributed to the State, while giving rise to a situation that was favourable to the occasioning of an injurious event, cannot be considered the direct cause because the event in question or the damage would have occurred in any case, due to other circumstances not attributable to the State.

In the *Rémy Martin* case[6], for example, the joint Franco-German Arbitral Tribunal refused to award damages for the lost profits to a French distillery as a result of an interruption of its activities following seizure by the German authorities during the war, because — even without the unlawful act of seizure — the distillery would in any case have remained inactive as it was impossible for it to receive during the war the French grapes needed for its products. The joint

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[1] Reply, p. 392, *supra*.

[2] *Ibid.*

[3] *Corso di diritto internazionale*, Padova, 1955, p. 431.

[4] "Proved that it had been a true and inevitable consequence" (unofficial translation). *Affaire Yuille et Shortridge* (21 October 1861), Lapradelle et Politis, *Recueil des arbitrages internationaux*, II, Paris 1932, p. 78.

[5] Mexico-U.S. Claims Commission, *Armando Cabos Lopez* case (2 March 1926), *Reports of International Arbitral Awards*, Vol. IV, p. 20. See also the arbitration decision in *Responsabilité de l'Allemagne à raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participe à la guerre* (30 June 1930), *Reports of International Arbitral Awards*, Vol. II, p. 1035; and the Italy-USA Conciliation Commission, *Hoffman* case (11 April 1952), *Reports of International Arbitral Awards*, Vol. XIV, p. 100.

[6] *Recueil des tribunaux arbitraux mixtes*, Vol. IV, p. 415; see also the *Lazare Dreyfus* case, *ibid.*, p. 393; the *Rousseau* case, *ibid.*, p. 379; and the *Lazare* case, *ibid.*, Vol. VIII, p. 495.

German-Romanian Arbitral Tribunal, in the *Carnabatu* case[1] also concluded that the requisition of an asset cannot be considered the cause of the loss of profits which might have been earned from selling that asset, considering that the state of war made the latter course of action impossible. Even more telling is the *Guillermot-Jacquemin* case[2], in which a French national sued for the return of two apartments in Rome which she had rented to an Italian public corporation and had been seized during the war. The Franco-Italian Conciliation Commission concluded that as rents in Italy had been frozen at that time by law, even

> "sans le séquestre et sans les mesures prises par le séquestrataire, M^{me} Guillermot-Jacquemin se trouverait, vis-à-vis de ses deux locataires, exactement dans la même situation que celle dont elle se plaint ... Tout lien de causalité fait donc défaut entre les restrictions que le Gouvernement français voudrait voir lever et les mesures prises par le Gouvernement italien à l'égard des deux appartements en tant que biens ennemis[3]."

5. Adequate Causality and the Obligation to Make Reparation

In certain cases, the reason why the causality link between the unlawful act of the State and injury caused to a private person has been deemed too remote has been the fact that the victim's own conduct (or a situation created by the victim himself) had exposed him to the influence of the unlawful act, which, without that conduct or that situation, would not have caused any injury at all. An example of this is the *Dame Simone Reverand* case[4], relating to a house that had been auctioned in Italy during the war as a result of allegedly unlawful obstacles placed in the way of the owner, a French citizen, and preventing her from transferring to Italy the necessary funds to pay the interest due on a mortgage on that house. Since "la situation pécuniaire de M^{me} Reverand était avant le 10 juin 1940 obérée à tel point que depuis mai 1939 elle n'avait pu acquitter les arrérages de sa dette hypothécaire"[5], the Franco-Italian Conciliation Commission concluded that "l'on ne peut soutenir dans ces conditions que c'est dû au fait de la guerre que l'intéressée s'est trouvée hors d'état de payer les arrérages en question"[6].

There are other cases, in which the refusal to grant compensation has been determined not only by "le lien trop lointain qui rattache la perte au fait générateur", but also "par le caractère *trop aléatoire* du bénéfice espéré"[7]. This happened particularly in cases where the damage for which compensation was claimed depended on loss of an income which was wholly contingent, even if the allegedly unlawful act on the part of the State had not been committed.

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[1] *Recueil des tribunaux arbitraux mixtes*, Vol. V, p. 228; and *Klotz*, *ibid.*, Vol. II, p. 758.

[2] *Reports of International Arbitral Awards*, Vol. XIII, p. 70.

[3] "Without the requisition and without the measures taken by the sequestrator, Madam Guillermot-Jacquemin would have found herself in exactly the same situation vis-à-vis her two tenants as that of which she complains . . . Any causal link is therefore missing between the restrictions which the French Government would like to see removed, and the measures taken by the Italian Government with respect to the two apartments as enemy property." (Unofficial translation.)

[4] *Reports of International Arbitral Awards*, Vol. XIII, p. 276; see also the *Roger Sudreau* case, *ibid.*, p. 680.

[5] "The financial situation of Madam Reverand before 10 June 1940 was burdened with debt to such a degree that since May 1939 she had not been able to pay the arrears of her mortgage debt". (Unofficial translation.)

[6] "In this situation it cannot be maintained that it is due to the war that the party concerned found herself unable to pay the arrears in question." (Unofficial translation.)

[7] "The too distant link between the loss and the generating event" . . . "by the *too chancy* character of the benefit hoped for." (Unofficial translation), Lapradelle et Politis, *op. cit.*, p. 284.

One may cite on the same line of thought, the *Rudloff* case, in which the umpire held that

> "le cas présenté ici n'est pas celui de la perte de profits prévisibles provenant d'une affaire en marche ou de bénéfices certains provenant d'un contrat inexécuté ; c'est seulement le profit espéré d'une affaire aventureuse injustement empêchée dans son accomplissement par le gouvernement défendeur. Pour cette raison, les gains escomptés par les réclamants ne peuvent pas être retenus parce que ces derniers sont totalement impuissants à démontrer qu'un profit serait résulté de l'affaire[1]."

Similarly, the umpire in the *Rice* case concluded that

> "As to the portion of damages claimed which may be imagined to arise out of consequential damages, the umpire desires to lay down as one of the requisites for consequential damage that there must be a manifest wrong, the effect of which prevents the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned, according to custom and business. A mere device of speculation, however probable its success would have been or may appear to the projector, cannot enter into the calculation of consequential damages[2]."

All these conclusions were even more concisely summed up by the umpire in the *Mora and Arago* case, in the following words: "The loss is in the present case of a very speculative character as depending upon most uncertain contingencies[3]."

In other words, with all the differences possibly resulting from the different aspects of the cases in point, international arbitration awards confirm the need to take into account, when deciding on the obligation to make compensation and on the amount of reparation due, not only the link between each wrongful act attributed to the State and each injury for which reparation is sought, but also of the influence of circumstances or acts not attributable to the respondent State on bringing about that injury.

6. Methods for Assessing the Damage. They are Unsafe in the Instant Case

The Applicant shows little concern about the existence of an adequate causal link between the alleged unlawful acts which it attributes to Italy and the damage for which reparation is claimed. From the part of the Reply dealing with compensation it would appear that it was solely the Mayor's requisition decree that gave rise to the alleged injury[4]. This decree allegedly prevented the orderly liquidation of ELSI, forcing the company to ask for bankruptcy, and thus making Raytheon liable for payment of ELSI's debts which had been guaranteed by Raytheon. Because of this decree, Raytheon suffered the loss of the loans made to ELSI[1], as well as the charge of all the legal and allied expenses relating not only to the bankruptcy proceedings and the present dispute, but also to the defence of Raytheon in civil suits instituted against it by some banks.

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[1] "The case presented here is not that of a loss of the foreseeable profits of a deal in progress or of the certain benefits coming from a contract which has not been performed; it is merely the benefit which was hoped to come from an adventurous deal, the fulfilment of which has been unjustly prevented by the respondent Government. For this reason the profits expected by the claimants cannot be held back as the latter are totally unable to demonstrate that a profit would have resulted from the deal." (Unofficial translation.) The *Rudloff* case may be found in English in *Reports of International Arbitral Awards*, Vol. IX, pp. 244 ff.

[2] Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, IV, Washington 1898, p. 3248.

[3] Moore, *op. cit.*, IV, p. 3783.

[4] Reply, p. 392, *supra*.

The previous pages have amply demonstrated that no evidence whatsoever was given of the chain of causality which the Applicant alleges. Furthermore, it must be recalled that this alleged chain of causality seems to be mainly based on the mere hypothesis that Raytheon would have been able to obtain a quite different financial result in the event of an orderly liquidation. The United States Government maintains that ELSI's creditors would have obtained total satisfaction if this had been possible, and Raytheon would have avoided the aforementioned repercussions stemming from ELSI's ruinous state. According to the Applicant, all this would have been possible because "had the Respondent not interfered with the liquidation, Raytheon and Machlett would have recovered the market value of ELSI as a going concern in 1968"[2].

In the previous pages, as well as in the Counter-Memorial, the Italian Government is confident to have fully demonstrated that all the allegations put forward by the United States Government against Italy are unfounded. We could therefore stop here, not seeing any purpose in commenting on the evaluation of damages which, in the opinion of the Respondent Government, did not exist or were not imputable to the Italian authorities' behaviour. However, for the sake only of wholeness, the Italian Government will offer in the following pages some few comments on the criteria used by the Applicant to evaluate the damages allegedly suffered by Raytheon and Machlett because of Italian wrongful acts.

The Applicant contends that the *whole* book value of ELSI would have been realized in the liquidation process, the book value being considered as the closest to its going concern value[3]. This seems hardly practicable for the purposes of evaluating the injury allegedly caused to Raytheon, because according to the principle accepted by international law judicial practice, the onus is on the claimant for reparation to prove that

> "soit en consultant le cours ordinaire des choses, soit en s'attachant aux affaires de la partie lésée ou des dispositions prises par elle, il est *probable* — *non pas seulement possible* — que celle-ci aurait réalisé tel ou tel profit si le fait illicite ne s'était pas produit[4]".

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[1] According to the Applicant, account should also be taken, when computing the damages, of what Raytheon would have earned as a result of the orderly liquidation. In the attempt of showing that the compensation requested is relatively modest, the Applicant stresses how their amount would at all events be insufficient "to recoup Raytheon's and Machlett's investment in ELSI, since they still would have lost over US$11 million in investments made since 1956" (Reply, p. 393, *supra*). On what conceivable basis should the Italian Government be liable for these sums?

[2] Reply, p. 393, *supra*.

[3] *Ibid.*, p. 395, *supra*. It should be noted that in the United States Government's view, unspecified "actions of the Respondent" "made it impossible for ELSI to become self-sufficient"; therefore it would have made it impossible to compute "the future profits of the company's continued operations" in the valuation of ELSI as a going concern.

[4] "Both by taking into consideration the ordinary course of events and by considering the business of the injured party of the provisions it took, it is *probable* — *not merely possible* — that it would have made such or such other profit if the illicit event had not occurred." (Unofficial translation.) The quotation is drawn from the arbitral award *Fabiani* case, to which the Applicant referred on several occasions in the Memorial and the Reply.

The hypothesis of realizing ELSI's *entire* book value through liquidation must, however, have appeared utterly improbable at the time, and even impossible to Raytheon itself, because ELSI's own management had envisaged a quick-sale value which was far lower than the book value, and insistently sought — without success — an agreement with ELSI's main creditors based on the payment of only 50 per cent of the amounts owing to them.

The truth, as demonstrated earlier, is that the scenario of realizing ELSI as a "going concern" was wholly at odds with reality[1]. In this connection, it is worth noting that, while the Memorial considered this as the most optimistic scenario, the Reply surprisingly credits it with being the only possibility! The proof that this does not correspond with reality, despite the contentions of the Applicant, may be found (beyond what is said in the relevant parts of the Counter-Memorial and this Rejoinder) in the fact that in the 1974 Claim, Raytheon's own valuation of ELSI fell very far short of the so-called "quick-sale" value.

Now, the United States Government contends that such valuation was the "worst case scenario" presented "for purposes of internal corporate planning by ELSI's shareholders"[2]. However, the United States Government now rejects what had been depicted as "a worst case scenario" by saying that it was used in the 1974 Claim *introducing* negotiations "in a spirit of compromise"[3]. This statement is really hard to swallow, and one cannot neglect considering that two different valuations — one by the bankruptcy receiver, and one by ELTEL — show far lower figures!

Having noted this, in passing, the onus is certainly not on the Respondent — who denies that anything unlawful has been done and hence rejects any obligation to pay any reparation for the alleged injury — to suggest any alternative method of valuation. As indicated already in the Counter-Memorial[4], Italy's remarks are offered solely as a means of showing up "the dubious contentions of law and the distortions of facts" in the Applicant's submissions.

7. Further Arguments on Refunding Legal Costs and Computing Interest

In addition to the considerations expressed in the Counter-Memorial[5], some further comments may be made on the issue of the legal expenses allegedly incurred by Raytheon. Despite what the United States Government maintains, the legal costs sustained by Raytheon for proceedings instituted in Italy against it by ELSI creditor banks cannot, at all events, be deemed to be "a direct consequence of the Respondent's actions"[6]. On the contrary, they were a consequence of ELSI's insolvency.

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[1] Claggett, "The Expropriation Issue before the Iran-United States Claims Tribunal: Is 'Just Compensation' Required by International Law or Not?", in 16 *Law and Policy in International Business*, 1984, pp. 884-885, referred to ". . . the settled and fundamental principle that the value of an asset depends not on its cost or past usefulness, but on its future usefulness". He further commented: "An asset may have cost millions of dollars to produce, or may have yielded tens of millions of dollars of profit in the past, but may have no present value if investors believe that the asset will produce no profit in the future."

[2] Reply, p. 396, *supra*. It is quite irrelevant to say that the quick-sale value does not reflect the full value of ELSI because it does not "take into account the significant intangible value of ELSI's business", considering that according to the Claimant, the intangible value is not even taken into account in the book value (p. 396, *supra*.).

[3] Reply, p. 396, *supra*.

[4] Counter-Memorial, p. 47, *supra*.

[5] *Ibid.*, p. 48, *supra*.

[6] Reply, p. 393, *supra*.

Anyway these costs, as granted by the Italian Court, must be considered as final, without any further possibility of claims on the part of the Applicant.

The need to take account of the Applicant's delay in submitting its claim to the Court, in order to decide whether or not the Applicant is entitled to interest on the amounts requested by it in reparation, is confirmed by international cases. It has been affirmed in international decisions that the failure of the allegedly creditor State to take action may affect the awarding of interest, or at least, the determination of the date from which the interest is calculated as accruing[1].

This appears to be fully justified if, in line with the prevailing doctrine, interest is considered as a possible element of the reparation and as such, as a lump-sum valuation of the loss of profit stemming from the fact that the unlawfully injured party could not dispose of a sum equivalent to the damage occasioned to it[2]. From this point of view, the computation of the interest must certainly take account of the obligation of the injured party, also sanctioned by international case-law[3], to reduce to a minimum the prejudicial consequences of the unlawful act of which it claims to be victim.

In practical terms, it should be noted that the decisions of international arbitration tribunals about interests were often influenced by considerations of equity. This happened especially in cases in which the amount involved would be far higher than the "principal" amount due in reparation because of the long period of time with regard to which the interest would have to be calculated[4].

Therefore, bearing in mind that international case law is virtually unanimous in refusing to acknowledge a right to interest — let alone compound interest[5] — the claim of the Applicant on this point is to be considered as lacking of a sufficient justification.

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[1] See the *Macedonian* case, Lapradelle et Politis, *op. cit.*, II, pp. 203-205.

[2] Anzilotti, "Sugli effetti dell'inadempienza di obbligazioni internazionali aventi per oggetto una somma di denaro", in *Rivista di diritto internazionale*, 1913, pp. 54 ff.

[3] See, for example, the *Coipwer* case, Lapradelle et Politis, *op. cit.*, I, p. 348. And the cases cited by Derains, "L'obligation de minimiser le dommage dans la jurisprudence arbitrale", in *Revue de droit des affaires internationales*, 1987, pp. 375 ff.

[4] See the *Macedonian* case and particularly the *Yuille et Shortridge* case, cited above.

[5] The Iran-U.S. Claims Tribunal "has never awarded compound interest", *Sylvania Technical Systems v. Iran*, *cit.*

SUBMISSIONS

The Italian Government makes the following submissions:

"May it please the Court,

To adjudge and declare that the Application filed on 6 February 1987 by the United States Government is inadmissible because local remedies have not been exhausted.

If not, to adjudge and declare:

(1) That Article III (2) of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;
(2) That Article V (1) and (3) of the Treaty has not been violated;
(3) That Article V (2) of the Treaty has not been violated;
(4) That Article VII of the Treaty has not been violated;
(5) That Article I of the Supplementary Agreement of 26 September 1951 has not been violated;

and, accordingly, to dismiss the claim."

18 July 1988.

(*Signed*) Luigi FERRARI BRAVO,
Agent of Italy.

DOCUMENTS ANNEXED TO THE REJOINDER OF ITALY

Document 1

AFFIDAVIT OF ING. CAVALLI, DATED 29 APRIL 1988

[Italian text not reproduced]

(Translation)

1. My name is Giacomo Cavalli. I was born in Brescia on 1 November 1928, and live in Via G. Garibaldi 16, Paderno Franciacorta (Brescia). I graduated from Padua University in 1954 in civil engineering, majoring in building construction.

From 1956 to 1977, I was employed by Società Italiana Telecomunicazioni Siemens S.p.A., where, during the relevant period 1969-1972, I was in charge of the company's building construction and maintenance sector. I worked, *inter alia*, on the construction or restructuring of the Castelletto-Settimo Milanese, Terni, Santa Maria Capua Vetere, L'Aquila 1 and 2, Carini (Palermo) plants, producing the working drawings and acting as works manager.

2. I began to take an interest in the Via Villagrazia, Palermo, plant as soon as it had been acquired by the SIT Siemens group company, ELTEL, which I presume occurred in 1969.

The initial impact was very dispiriting. I have rarely seen a plant of such dimensions, which had been expanded without any overall plan, with construction features that differed completely from one department to another, badly constructed and in an extremely poor state of repair despite the fact that it was of recent construction.

The company immediately embarked on an exacting restructuring programme, with the twofold aim of continuing to keep certain product lines in operation, organized on a more rational basis, and of adapting other areas for new products.

Work was required on every area of the plant, not only to adapt it to meet the various production requirements, but also to ensure that it complied with the most elementary standards of industrial safety and hygiene.

I recall the following, in particular:

3. It was necessary to remove the heating units from the various places in which they were installed, almost invariably in contravention of safety regulations, to new purpose-built premises.

4. As stated above, the plant had been built in several stages and without an overall plan. As a result, the air-conditioning system was split up into a large number of different units, making it difficult and uneconomical to run. The refrigeration units were all installed on the new premises, the air conditioning units were grouped together into only a few units, and the air ducts had to be re-organized to meet the new production needs.

5. The sanitation facilities were virtually entirely rebuilt, and were completed with changing rooms in compliance with occupational hygiene standards.

6. The plant's dining facilities were very unhygienic, and they had to be completely rebuilt, fitted with modern equipment for both preparing and cooking the food, and for conserving it in the refrigerators installed for the purpose.

7. The layout of the production departments was completely redesigned, eliminating a huge number of internal dividing walls, providing them with appropriate access doors and corridors to guarantee personal safety in the event of accidents or panic, for whatever reason. The previous layout was unimaginably irrational as far as safety considerations were concerned. It should be recalled in this connection, that the water supply system for fire-fighting was completely reconstructed, and numerous extinguishers were installed on the premises.

8. It should also be noted that there was not even the most rudimentary civil and industrial waste disposal system required by the laws in force at the time. Waste water was discharged directly into the Oreto River. Septic tanks were installed for the sanitation facilities and separating, deacidification and dilution tanks were built for the industrial liquid waste. A complete waste disposal plant was subsequently built.

9. The waterproofing of the roofs had to be completely re-done, since there were so many leakage points that it was not advisable to deal with them individually.

Nearly all the flooring had to be re-laid.

These were the main operations that I can recall over 16 years on, without any documentation available to me.

The restructuring work was carried out, as far as possible, using the plant's own labour force, because many of the production lines were out of use and whole departments had to be dismantled. The work covered a period of over 18 months. Specialized companies were called in only for the work requiring skilled workmen.

(Signed) Giacomo CAVALLI.

In accordance with Article 26 of Law No. 15 of 4 January 1968, the undersigned Dr. Maria Pezzi, Notary Public in Bedizzole, entered in the Roll of the Notarial College of Brescia, hereby declares that Ing. Giacomo Cavalli, born in Brescia on 1 November 1928 and living in Via Garibaldi 16, Paderno Franciacorte (Brescia), and who is known to me, having renounced the presence of witnesses, with my consent, made and signed the above declaration in my presence, after hearing my warning as to the penal consequences to which he would be liable in the case of untruthful declaration.

Brescia, 29 April 1988.

(Signed) Maria PEZZI.

Document 2

AFFIDAVIT OF DR. BEVILACQUA, DATED 29 OCTOBER 1987

[Italian text not reproduced]

(Translation)

1. My name is Dr. Paolo Bevilacqua. I was born at Pietraperzia (Enna) on 14 September 1923 and am resident at No. 6 Via Brigata Verona, Palermo.

I graduated in medicine at the University of Palermo in 1950.

2. In 1968 I was Mayor of the Municipality of Palermo, and in my resulting capacity of Government Official, I issued an order to requisition with immediate effect and for the duration of six months the plant and relative equipment belonging to Raytheon ELSI S.p.A.

The requisition order was issued in accordance with the powers granted to me under Article 7 of law No. 2248 of 20 March 1965, Appendix E and Article 69 of D.L. vo. P. Reg. No. 6 authorizing the Mayor to make provisions concerning private property.

3. The requisition order, which remained in force for six months, was issued in response to the serious consequences that the threatened closure of Raytheon, and the resulting loss of jobs, would have on both the economy and on law and order. At the time, Raytheon was in fact the largest company in the Palermo area in terms of number of employees (about 1,000) and any dismissals would have had disastrous consequences for an equivalent number of families.

The already precarious overall economic situation in the whole area would also have been further weakened.

4. Also the situation regarding law and order was a matter of concern: the workers' protest, supported by the trade unions, by the political forces and also by church representatives was growing as the days passed.

In view of the circumstances I deemed it necessary to issue the requisition order, also for the purpose of calming the growing discontent, which could otherwise lead to extremely dangerous situations.

6. Furthermore, the order itself was issued in accordance with the policy followed in those years by the mayors of many other Italian cities in similar situations and circumstances: only a short time earlier a similar measure had been taken in Florence for the "Nuovo Pignone".

7. My order, therefore, was not only justified under existing law but also by current practice. A further reason for issuing the order was also to avoid damage caused by the "non use" of the Raytheon industrial complex. Not only did the order contain a precise reference to the payment of compensation, but it also appointed someone to manage the company in the person of Ing. Profumo (and subsequently, Ing. Laurin, because of the latter's unavailability). I therefore had no punitive intentions vis-à-vis the company ownership; quite the contrary; my aim was to make it possible for normal company activities to be continued in order to safeguard jobs and to keep the plant serviceable.

8. The occupation of the plant by the employees (which started well before the requisition) turned out to be of a "co-operative" nature after the requisition and was no obstacle to the continuation of those activities which were possible under the circumstances.

(*Signed*) Paolo BEVILACQUA.

I, the undersigned Dr. Francesco Pizzuto, Notary Public in Palermo, entered in the Roll of the Notarial College of Palermo, hereby certifies that the declarant made the above declaration in my presence after being warned by me of the responsibilities and penal consequences involved in the case of false or reticent declaration.

I ascertained the personal identity of the declarant by personal acquaintance.

Palermo, 29 October 1987.

(*Signed*) Francesco PIZZUTO,
Notary Public.

Document 3

AFFIDAVIT OF AVV. MAGGIO, DATED 29 OCTOBER 1987

[Italian text not reproduced]

(Translation)

1. My name is Nicolò Maggio. I was born at Palermo on 3 September 1931 and am resident at 20 Via Madonie, Palermo. I graduated in Law from the University of Palermo on 21 June 1951. In 1968 I was a lawyer employed by the Municipality of Palermo, a post which I had held since 1957.

2. The trade union situation in March 1968 was serious because of the announced closing of the Raytheon-ELSI due to the company's insolvency and the management's intention in any case to transfer or close down the plant. The tensions among the workforce were echoed in the City as the social forces and trade union organizations had expressed their solidarity at all levels. This solidarity and the interest in the problem aroused in the entire city and in political and economic circles can be explained by the fact that, at the time, the plant employed one of the largest labour forces in the Palermo district. This led to industrial action and a general strike in support of the R.E. workers, who were defending their jobs, to demand that all suitable measures should be taken to avoid the closure of the plant, which, in an extremely civilized fashion and without causing any damage, was occupied by the plant employees themselves.

3. The requisition order was issued on 1 April 1968. I was appointed the Mayor's Representative, together with Dr. Armando Celone. Ing. Profumo was appointed custodian of the plant, but had to be replaced by Ing. Laurin as he was not to be found.

4. On the whole the plant workers were favourable to the requisition. They understood that it was aimed at getting the plant going again. There were no problems such as "hard" picketing, and so on.

5. The Nato HAWK system production line was reactivated. We proceeded regularly with the contracts on hand.

6. I never took part in talks with IRI or with any other possible purchasers concerning the transfer of ELSI. The Raytheon management continued to run all these meetings.

(Signed) Nicolò MAGGIO.

I, the undersigned Dr. Francesco Pizzuto, Notary Public in Palermo, entered in the Roll of the Notarial College of Palermo, hereby certify that the declarant made the above declaration in my presence after being warned by me of the responsibilities and penal consequences involved in the case of false or reticent declaration.

I ascertained the personal identity of the declarant by personal acquaintance.

Palermo, 29 October 1987.

(Signed) Francesco PIZZUTO,
Notary Public.

Document 4

Decision N. 107 of the Court of Cassation, Dated 14 January 1976, *Foro Italiano*, 1976, I, 2463 ss.

EXCERPTS

[Italian text not reproduced]

(*Translation*)

Corte di Cassazione: First Civil Section; Decision of 14 January 1976, N. 107

President	Caporaso
Drafted by	Carnevale
Public Prosecutor	Berri (concl. conf.)

Ministry of Treasury *versus*
Company Mander Brothers Ltd.
(Avv. Testa, Biffi).

Appeal confirmed Rome, 27 April 1972.

Civil jurisdiction — War events — Injury or damages to assets of United Nations citizens — Italian jurisdiction — Subsistence.

(Law Decree N. 1430 of 28 November 1947, implementation of the Peace Treaty between Italy and the Allied and Associate Powers, signed in Paris on 10 January 1947, Arts. 78, 83.)

The Italian judge is competent for jurisdiction in connection with the claim for compensation filed by a United Nations citizen against Italy under Article 78, n. 4, of the Peace Treaty; he is directly legitimated to exercise such jurisdiction without being hindered by the possible concurrent resort — on the part of the citizen's State — to any remedies before the International Conciliation Commission provided for in Article 83 (1).

(*Omissis.*) The assumption underlying the alleged lack of *locus standi* of Mander Brothers in relation to the actionability of the claim to damages before Italian courts cannot be shared.

In accordance with generally recognized principles, an international treaty may directly attribute to subjects lacking an international status legal rights enforceable against one of the contracting States.

In such an hypothesis, where the abstract situation envisaged by the treaty as attributive of the individual right is complete in all its essential elements and the treaty itself has been implemented in the municipal legal system through one of the *ad hoc* procedures recognized in the domestic law of the State as to which right is to be enforced, there arise two distinct obligations to be charged to the State: one is effective on the international plane vis-à-vis the other Contracting State (or States) and its breach, in so far as it gives rise to an international responsibility, can in principle be enforced only by another State before the competent international jurisdiction; the other is effective in the domestic legal system vis-à-vis the protected subject, who is entitled to seek enforcement of the corresponding right before the Courts of the same domestic legal system.

The two forms of jurisdictional protection, operating respectively in the international legal system and in the municipal law of the burdened State, are, as a rule, concurrent in the sense that, except for the case in which the treaty expressly provides for the assimilation of the domestic remedies into the international ones, the protected subject may exercise against the burdened State the judicial remedies made available in its domestic legal system, independently from or concurrently with the resort on the part of its national State to the remedies provided for by the international legal system.

In applying such principles, the Supreme Court sitting in plenary meeting (*Sezioni Unite*) has recently held (judgment of 13 November 1974, No. 3592), with reference to the specific question herewith proposed, that Article 78, paragraph 4, of the Peace Treaty between Italy and the Allied Powers (the treaty was given effect in the domestic legal system with d.l. No. 1430 of 28 November 1947), in providing that the Italian Government be charged with the obligation to indemnify citizens of the United Nations for losses suffered, from wartime events, following injury or damages caused to their property in Italy, gives rise, along with an international obligation of the Italian State vis-à-vis the other Contracting States, to a direct legal relation of a binding character, between the first State and the individual citizens of the United Nations. Such relation, complete in all its essential elements, is immediately effective in the domestic legal system, without the further requirement of a normative act of integration or of implementation, and therefore, as was pointed out by the *Sezioni Unite* of this Supreme Court, it is actionable by the same citizens before Italian courts. To this effect no obstacle can be found in the jurisdictional competence, reserved by Article 83 of the Treaty to the Special International Conciliation Commission with regard to disputes arising from the above-mentioned Article 78, in that such international jurisdiction can be resorted to only by the Contracting States and by no means has been intended to provide a domestic legal remedy open to the individual citizens concerned.

The ruling established by this precedent, which fits into a consistent case law of this Court, must be firmly maintained in the present case also, as no argument has been put forth to justify the re-examination of its *ratio*.

With a second complaint charging the omitted and contradictory *ratio decidendi* on a decisive point of the dispute, as well as the violation and the incorrect application of Article 78 of the Peace Treaty . . . the appellant asserted, first, that the Court had not considered that seizure effected on the basis of wartime law in relation to the assets of the branch office of the English firm did not constitute a war event within the meaning of Article 78 of the Peace Treaty (as did destruction for wartime operations, pillage, and so on), but was an internationally lawful act; and, second, that the Court had omitted to adjudicate on a decisive point, namely, on whether the loss suffered by the Mander Brothers firm was dependent upon conjunctural events, that is, upon the interruption of all commercial relations between the Italian branch and the Home Office in England during the war, in which case, the damage would amount to a *lucrum cessans*, thereby falling outside of the scope of treaty provisions contemplating indemnification.

Neither of the two complaints attached to this second ground of the appeal are founded.

As to the first, it should be noted that the indemnity due to the Mander Brothers company is that provided by Article 78, paragraph 4, subpara. (1) of the Peace Treaty for compensation of losses and damages suffered by United Nations citizens as a consequence of the application of special provisions adopted with respect to their property by Italian authorities during the war.

Such indemnity, not being of a reparatory nature and not falling within the sphere of responsibility of the public administration for legal acts, fulfills the functions of restoring the economic interests upset by the execution of a measure adopted by the Italian State vis-à-vis the citizen who was formerly an enemy; and, in view of said function, the distinction between the lawful or unlawful character of the act that caused the loss becomes immaterial.

With regard to the other complaint, it is sufficient to note that the lower Court adequately examined the point proposed by the appellant and, on the basis of the results of the technical appraisal, which was performed in the proceedings before the Civil Court, concluded that the damages complained of by the Mander Brothers company consisted not in missed profits, but in the objective loss in the value of the firm's net assets consequent to the taking and evidenced by the comparison between the inventory of such assets at the time of the execution of the seizure and the situation ascertained at the date the properties were returned to the firm.

The appeal is thus unfounded as to all the grounds on which it was submitted and must therefore be rejected *(Omissis)*.

Document 5

DECISION N. 1455 OF THE COURT OF CASSATION, DATED 21 MAY 1973, *FORO ITALIANO*, 1973, I, 2443-2460

EXCERPTS

[Italian text and English translation not reproduced]

Document 6

DECISION N. 971 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF PUGLIA, DATED 17 DECEMBER 1974

[Italian text and English translation not reproduced]

Document 7

DECISION N. 198 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF ABRUZZO, DATED 11 DECEMBER 1974

[Italian text and English translation not reproduced]

Document 8

AFFIDAVIT OF DR. RAVALLI, DATED 18 DECEMBER 1987

[Italian text not reproduced]

(Translation)

1. My name is Giovanni Ravalli. I was born on 21 June 1909 in Monterosso Almo (Ragusa), and am domiciled in Rome, at No. 179 via C. Colombo. I graduated in Law from the University of Catania on 30 November 1930.

2. I became an official of the Ministry of the Interior in 1932, and was nominated Prefect in 1959, the rank with which I retired in 1974. Among other posts, I was Prefect of Palermo from 1964 to 1970, during the period in which the following events occurred.

3. The social and economic situation in Palermo and western Sicily became particularly difficult in 1968 after the earthquake in January that year; the situation was worsened also by the ongoing trade union action which, the following March, culminated in the occupation of the Raytheon-ELSI factory by the plant employees.

4. I was given verbal notification of the decision by the interim Mayor of Palermo to requisition the aforesaid plant just prior to the notification of the order to the parties concerned. It must be said that the measure was not an exceptional one since, during the same period, in similar circumstances, numerous other such urgent orders were issued by other mayors in Italy.

5. What usually happens in such cases is that the owner of the requisitioned company immediately appeals to the Prefect against the order. To my surprise, the Raytheon-ELSI Management did so only 19 days after the issue of the order.

Furthermore, to my knowledge the productive activities of the plant had already ceased and the problem facing the aforesaid Management was rather that of obtaining from the State sufficient aid to survive the serious economic crisis that had afflicted the company for some time. To this end, the Raytheon-ELSI company had made overtures to the local (Regional and Municipal) and central authorities, also after the issue of the requisition order.

6. The impression I got from the aforegoing was that both the appeal against the requisition and the bankruptcy petition filed with the Court of Palermo immediately afterwards were merely tactical moves aimed at influencing the Authorities, who were reluctant to accept the above-mentioned requests for aid. This is confirmed by the fact that neither the Company nor, after the declaration of bankruptcy, the Trustee, saw fit to make recourse to the intimation procedure provided for by Article 5 of the Consolidated Legislation of 3 March 1934 in order to have the Mayor's Order revoked until 9 July 1969. It was therefore possible to declare the order illegitimate only on 22 August 1969, that is, many months after the requisition had ceased to have any effect.

7. The occupation of the plant by the employees, which began before the order was issued, was mainly demonstrative in nature and caused no harm to persons or any material damage, nor did it have any repercussions on law and order.

Rome, 18 December 1987.

(Signed) Giovanni RAVALLI.

Notary Public
Rome, Via Capo Le Case, 3
Tel. 678.46.30

This eighteenth day of the month of December nineteen eighty-seven (18-12-1987), in Rome, Via Capo Le Case three, in my office, I, the undersigned Att.y Vincenzo Augusto Fiduccia, Notary Public resident in Rome and enrolled in the Notarial College of Rome, Velletri and Civitavecchia,

hereby certify

that Dr. Giovanni Ravalli, born at Monterosso Almo (Ragusa) on 21 June 1909, domiciled in Rome at No. 179 Via C. Colombo, retired Prefect, whose personal identity is known to me, the Notary Public, by direct acquaintance, having been warned by me the Notary Public in accordance with Article 26 of Law No. 15 of 4 January 1968, made the above declaration and signed it in my presence, to certify and authenticate which I have affixed my signature.

(*Signed*) Vincenzo Augusto FIDUCCIA.

Document 9

DECISION N. 211/75 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF LOMBARDY, DATED 16 JULY 1975

[Italian text and English translation not reproduced]

Document 10

DECISION N. 210/75 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF LOMBARDY, DATED 16 JULY 1975

[Italian text and English translation not reproduced]

Document 11

DECISION N. 2228 OF THE COURT OF CASSATION, DATED 30 JULY 1960, *RIVISTA DI DIRITTO INTERNAZIONALE*, 1961, VOL. XLIV, PP. 117-119

[Italian text and English translation not reproduced]

Document 12

Decision N. 2579 of the Court of Cassation, Dated 6 December 1983-17 February 1984, *Commissione Tributaria Centrale*, 1984, II, 1143

[Italian text and English translation not reproduced]

Document 13

Affidavit of Dr. Cammarata, Dated 26 May 1988

[Italian text not reproduced]

(*Translation*)

My name is Pio Cammarata, born in Palermo on 26 December 1937, a graduate in law, resident in Milan in Via Gavirate, 16. In 1968-1972 I was personally involved with the matters relating to the general secretarial work and operation of the SIT-Siemens management bodies, and was appointed by Head Office to represent the company in the procedure for the public auction sale of the Raytheon ELSI Company.

The joint stock company, Eltel Elettronica e Telecomunicazioni was incorporated specifically for this operation, with a share capital of Lire 1,000,000,000, which was subsequently increased to Lire 3,000,000,000.

During the period prior to this operation, I attended several senior management meetings to examine the request which the group had received to take over the Raytheon ELSI S.p.A. company.

From the very beginning, the information available on the products and the company's prospects led senior management to the conclusion that acquisition of the company was not a viable proposition.

Later, when the company was declared bankrupt, the official report from the Trustee in Bankruptcy was examined, and on-the-spot investigations were carried out to ascertain — *inter alia* — the assets.

Our own experts found that the expert's valuation was not realistic, and concluded that account had mainly been taken of the land available for building construction (!), while the facilities and most of the buildings needed to be completely rebuilt.

In short, it was deemed more viable to build a new factory *ex novo*.

However, for social reasons, it was decided to take over the factory and take on the employees of the former bankrupt company.

No other buyer bidded at the various attempted auction sales, and when I submitted my offer I was the sole bidder.

In my functions as Secretary to the Board of Directors and senior management, I later witnessed the difficult and costly process of restructuring the factory which, in order to be able to be started up in break-even, had to change its layout and product range completely.

(*Signed*) Pio CAMMARATA.

I, Massimo Mezzanotte, in my capacity as Notary Public, attest that the above signature was written in my presence by Dr. Pio Cammarata, born in Palermo on 26 December 1937, resident in Milan in Via Gavirate 16, whose identity I have ascertained, in my capacity as Notary Public.

Milan, 26 May 1988.

(*Signed*) Massimo MEZZANOTTE,
Notary Public in Milan.

Document 14

AFFIDAVIT OF RAG. RAVALICO, DATED 26 MAY 1988

[Italian text not reproduced]

(*Translation*)

My name is Ingo Ravalico, born at Wiener Neustadt on 14 June 1917, and resident in Milan in V. Monti 71.

From 1963 to 1975 I was the managing director of SIT-Siemens, now ITALTEL, and in that capacity I was the most senior person responsible for the manufacturing group belonging to SIT-Siemens.

IRI "interested" SIT-Siemens in proceeding with the acquisition of the bankrupt company, ELSI.

The term "interested" is actually inexact, because no-one was "interested" in ELSI because of its well-known technical obsolescence and commercial incompetence. But to prevent trade union unrest — the year was 1968 — and sit-ins in Via Veneto in front of IRI head office, it was necessary to "take an interest in the business", mainly for reasons of law and order. I personally directed the takeover operations in my aforementioned official capacity.

After obtaining possession of the ELSI company, initially as lessees, we found the following situation:

1. The general facilities were inadequate, dilapidated and badly designed from the very beginning. The company had not grown according to an organic economic development plan. It had developed on a day-to-day basis. One of the consequences of this was that the production facilities had been sited haphazardly, in temporary structures, etc. As a result, most of the general facilities — after we had taken possession of them — were only scrap metal, and were sold off as such, because they necessarily had to be replaced by viable general facilities.

2. The production lines were all old, broken down and obsolete. The semiconductor line (the most bankrupt), the X-ray tube line, the microwave oven line, etc., which had been of inefficient production capacity *ab origine*, were all written off at once as scrap. It was not that they were obsolescent as a result of having been shut down pending the bankruptcy proceedings. They were obsolescent due to prior industrial and technical reasons. An attempt was made to salvage the TV

cathode ray tubes line, and the line producing microwave tube for military use. The first was a failure, and the second was successful thanks to considerable intervention.

The cathode (picture) tube line was organized using absolutely outdated technology, and it manufactured products that were completely useless on the market. These were black and white 23″ picture tubes that were totally unsaleable on the Italian market in those years. And they were made using glass from Russia, with absolutely prohibitive transportation costs to Palermo, as one can well imagine. Since the technology then being used was no longer sound, an attempt was made to negotiate to be able to continue using RCA technology. But even this attempt proved negative.

It was not enough to change the technology: it was necessary to start *ex novo*, with huge new investments to cater for the demand of a market that was now moving towards colour TV. Raytheon ELSI's commercial network was almost non-existent, and it had a bad commercial image.

The microwave tube line was continued, because the prospects existed for the products to be absorbed on the market, providing work for a few dozen members of the company's 1,000-plus workforce.

But it became necessary to renegotiate the assistance contracts with Raytheon, in order to be able to obtain the technical information and updates needed, in view of Raytheon's extremely, and quite unjustifiably, high royalties.

After a short time, it became clear that this attempt could not proceed further, and it became necessary to think about starting up work on completely new products that would enable the company to retrain several hundred workers for new jobs.

3. The stocks were not able to cover even the cost of managing them. The stores were full of unsaleable picture tubes, above all, and old, wholly unusable materials that were for the production lines that were going to be sold off as scrap.

4. Through ELTEL S.p.A., which it controlled, SIT-Siemens had to invest over Lire 4,000,000,000 immediately in order to buy up Raytheon at the judicial bankruptcy auction held on 12 July 1969.

It later had to invest about 3,500 million between 1969 and 1972 to restructure the plant, general facilities, and the machinery and production lines, and to retrain the workforce.

5. ELTEL then moved the production of the electronic parts of the power units for the telecommunications facilities from Aquila to Palermo, at the former ELSI factory. The only way to keep the local jobs was to rebuild the whole factory, in practice, because as Raytheon had left it, the factory was absolutely useless in technical and production terms, and had only been taken over as a bankrupt concern on purely social grounds.

(Signed) Ingo RAVALICO.

I, Massimo Mezzanotte, in my capacity as Notary Public, attest that the above signature was written in my presence by Mr. Ingo Ravalico, born at Wiener Neustadt on 14 June 1917, and resident in Milan in Via Vincenzo Monti N. 71, whose identity I have ascertained, in my capacity as Notary Public.

Milan, 26 May 1988.

(Signed) Massimo MEZZANOTTE,
Notary Public in Milan.

Document 15

DECISION N. 2293 OF THE COURT OF CASSATION, DATED 6 JULY 1968, *RIVISTA DI DIRITTO INTERNAZIONALE*, 1969, PAGES 328-331

[Italian text and English translation not reproduced]

Document 16

ARTICLES 834, 835, 1181, 2043, 2447, AND 2621 OF THE ITALIAN CIVIL CODE

[Italian text not reproduced]

(Translation)

834. Expropriation in the public interest. No one can be deprived in whole or in part of the property that he owns, except in the public interest, legally declared, and on the payment of just indemnity.

The rules concerning expropriation in the public interest are established by special laws.

835. Requisitions. When serious and urgent public, military, or civil necessity occurs the requisition of movable or immovable property (812) can be ordered. A just indemnity is due the owner.

The rules concerning requisitions are established by special laws.

(Translation)

1181. Partial performance. The creditor can reject a partial performance even though the performance is divisible, unless otherwise provided by law or usage (1314, 1315, 1384).

(Translation)

ARTICLE 2043. COMPENSATION FOR WRONGFUL ACTS

Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those damages.

(Translation)

2447. Reduction of capital below legal minimum. If, by reason of the loss of over one-third of the capital, it falls below the minimum established by Article 2327, the directors (2380) shall without delay call the meeting (2365) to decide on the reduction of the capital and the concurrent increase thereof to an amount not less than said minimum, or on the reorganization of the company.

(Translation)

2621. False information and unlawful distribution of profits. Unless the act constitutes a more serious offence a punishment consisting of imprisonment for one to five years and a fine of four hundred thousand to four million lire is imposed on:

1. promoters, founders, managers and directors, general managers, auditors, and liquidators who, in reports, balance sheets, or other information concerning the affairs of the company, fraudulently represent facts which do not correspond to the truth about the formation or the financial condition of the company or who conceal, wholly or in part, facts concerning such condition;
2. managers and directors and general managers who, in the absence of or contrary to an approved balance sheet, or on the basis of a false balance sheet, in any way collect or pay profits which are fictitious or which cannot be distributed.

Document 17

ARTICLES 323 AND 185 OF THE ITALIAN CRIMINAL CODE

[Italian text not reproduced]

(Translation)

ARTICLE 323. ABUSE OF AUTHORITY IN CASES NOT SPECIFICALLY PROVIDED FOR IN THE LAW

The public official, who, abusing the powers inherent to his office, in order to damage or favour someone, commits any action which is not considered an offence in any law, may be punished with detention up to two years or with a fine from 100,000 Lire up to 2 million Lire.

(Translation)

ARTICLE 185. RESTITUTION AND COMPENSATION FOR DAMAGES

Under civil laws, any offence makes restitution compulsory. Any offence which has caused a material or non-material damage makes compensation compulsory for the offender and for the person who, under civil laws, are responsible for his/her deeds.

Document 18

ARTICLES 23, 25, 26, 108 AND 218 OF THE ITALIAN BANKRUPTCY LAW, ROYAL DECREE OF 16 MARCH 1942, NO. 267

[Italian text not reproduced]

(Translation)

ARTICLE 23. POWERS OF THE BANKRUPTCY COURT

The Court which has declared the bankruptcy is competent for all bankruptcy proceedings; it deals with the controversies relative to such proceedings, which do not fall within the field of competence of the delegate judge; it rules on the claims filed against the delegate judge's decisions. The Court may at any time hear in chambers the trustee, the bankruptcy and the creditors' committee, and replace the delegate judge with another judge. The rulings of the Court on the matters envisaged in this article are issued with decree, which is not subject to any appeal.

(Translation)

25. POWERS OF THE DELEGATE JUDGE

The delegate judge is responsible for the bankruptcy proceedings, supervises the work carried out by the trustee and, furthermore:

(1) reports to the Court on any matter for which a decision of the Court is required;

(2) issues — or urges the competent authorities to issue — urgent provisions for the preservation of the estate;

(3) convenes the creditors' committee in the cases provided for in the law and when he deems it appropriate;

(4) authorizes the trustee to appoint the persons required to deal with the bankruptcy, except for the case when he himself — by virtue of law — has the competence to appoint them;

(5) rules — as promptly as possible — on the claims filed against the trustee's deeds;

(6) authorizes — with a written notice — the trustee to participate in the proceedings both as plaintiff and as defendant; appoints the counsel and the attorneys; authorizes the trustee to carry out temporary tasks, save the cases provided for in Article 35.

The authorization must always be given for specific acts, and for each degree of the proceedings;

(7) supervises the work carried out in connection with the bankruptcy by an especially appointed person, removes him from the post — if necessary — and pays his fees, after consultation with the trustee;

(8) carries out — with the trustee's co-operation — a preliminary examination of debts, real rights of third parties and relative documentation.

The delegate judge's decisions are issued by decree.

(Translation)

ARTICLE 26. APPEAL AGAINST A DECREE OF THE DELEGATE JUDGE

Save contrary provision, an appeal against the decrees of the delegate judge may be filed to the Court within three days from the date of the decree, on the part of the trustee, of the bankruptcy, of the creditors' committee, or of anybody who may be concerned.

The Court rules with a decree in chambers.

The appeal does not suspend the execution of the decree.

(Translation)

108. *Procedures in the sale of real estate.* The sale of real estate must be carried out at an auction.

However, the delegate judge, — upon a proposal of the receiver, having heard the Creditors' Committee and with the consent of the creditors entitled to claim the assets of the bankrupt, with a right of preference on the real estate, — may order the sale without an auction, should he deem it more advantageous.

The auctions are carried out upon an order of the delegate judge, after a request of the receiver, and take place before the judge himself, except otherwise provided for in Article 578 of the Civil Code.

The judge in charge may suspend the sale, should he deem that the offered price is considerably lower than the just price.

An excerpt of the order providing for the sale is notified by the receiver to each of the creditors entitled to claim assets of the bankrupt, with a right of preference on the real estate, as well as to the mortgage creditors.

(Translation)

218. *Unlawful taking out of loans.* Any entrepreneur — running a commercial business — who takes out or continues to take out loans, without disclosing his financial difficulties, is liable to detention up to two years, unless the fact represents an even more serious offence.

Except for any additional penalties under Chapter III, Title II, Volume No. 1, of the criminal code, the sentence entails the prohibition to run a commercial business, and to hold any senior executive posts for any company up to three years.

Document 19

MINUTES OF THE MEETING OF 20 FEBRUARY 1968

[For the letter of the Deputy-Registrar, dated 13 January 1988, see **III**, *Correspondence, No. 42; for the letter of the Deputy-Agent of the United States, dated 13 January 1988, see* **III**, *Correspondence, No. 41; manuscript document not reproduced; for the typed version see Unnumbered Documents Attached to the Counter-Memorial of Italy, Exhibit II-15, p. 295,* supra*]*

Document 20

REMARKS OF DR. ALESSANDRO ALBERIGI QUARANTA ON ELTEL'S APPLIED RESEARCH POTENTIAL, DATED MAY 1971

[Italian text and English translation not reproduced]

Document 21

LETTER TO THE EMPLOYEES OF RAYTHEON-ELSI S.P.A., DATED 16 MARCH 1968

[Italian text not reproduced]

(Translation)

16 March 1968.

Raytheon-ELSI S.p.A.,
Via Villagrazia 79
Palermo

TO THE EMPLOYEES OF RAYTHEON-ELSI S.P.A.

It is with the deepest regret that the Management of Raytheon-ELSI S.p.A. announces that the Board of Directors has this day resolved to cease company activities. The decision of the Board, taken after consultation with the shareholders, is that production will cease immediately and that commercial activities shall cease and the employees be dismissed as from 29 March 1968, i.e., immediately after the meeting of shareholders called for 28 March 1968.

The majority shareholder, Raytheon Company, has asked the Management to make clear to Raytheon-ELSI employees the tireless efforts made to avoid the above-mentioned event.

During the first few months of 1967, after a second refusal by the Italian partner at the time to make a further financial contribution to ELSI, the Raytheon Company and its associate The Machlett Laboratories, Incorporated, embarked on a bold programme to provide for the future of Raytheon-ELSI. This programme involved the following activities:

1. Purchase of the remaining 20 per cent of ELSI equity, valued at Lit. 300 million.
2. A further contribution of Lit. 2.5 billion to ELSI share capital.
3. A further contribution of Lit. 1.5 billion in the form of bank loans to provide ELSI with the resources needed to continue operations.
4. Rescheduling of the payments due to Raytheon Company from Raytheon-ELSI for the previous sale of services to the former, currently amounting to Lit. 1.1 billion.
5. Boosting of ELSI management by the inclusion of a group of highly qualified persons selected from the Raytheon Company staff.
6. Search for new products for ELSI, in particular by attempting to get the Government to apply the "third-party law" in favour of ELSI and also by obtaining new products from Raytheon in America.
7. Search for a powerful Italian partner, particularly from among State-holding companies, capable not only of providing ELSI with financial support but also of enhancing the company's range of products from Italian sources, of helping it to obtain the benefits due to companies in the Mezzogiorno and, lastly, to provide for ELSI's future within the framework of the national five-year plan.

All ELSI employees must be aware of the combined efforts made by the US and Italian management group in Palermo to try and place ELSI activities on a firm long-term economic footing.

ELSI-Raytheon employees may not be aware of the great efforts continuously made over the past 12 months to obtain support for the company from the national and regional governments, and from Italian private industry. These efforts also included numerous visits to Italy by the Chairman of the Board of Directors of the Raytheon Company, Mr. C. F. Adams, for top level talks, as well as continuous efforts by the Chairman of the Board of Directors of Raytheon-ELSI and members of the Raytheon Europe staff in Rome. These attempts also took the form of meetings, often many meetings, with the Presidency of the Sicilian Region, ESPI, IRI, Finmeccanica, the Ministry of Industry, the Ministry of State Holdings and the Ministry of the Treasury. Furthermore, all possible efforts were made to gain the support of Italian private industry.

The Raytheon Company, together with the ELSI Management, have always believed — and even in this sorrowful moment continue to believe — that the inclusion of a strong Italian partner willing to contribute both in the form of new products and with sufficient amounts of fresh capital, accompanied by the assurances of the national Government that the function of the Raytheon-ELSI will be acknowledged in any long-term national programme, Raytheon-ELSI could have become a profitable and expanding company with a significant role to play in the five-year plan for the development of the Italian electronics industry.

This point of view has been fully documented in three reports drawn up for ESPI in May, July and December 1967, copies of which have been circulated among all the above-mentioned agencies, institutes and ministries, except the Ministry of the Treasury. These reports presented carefully researched programmes for the introduction of new ELSI products, together with financial forecasts showing that the company could achieve profitability with the help of a strong Italian partner and the addition of sufficient new investments. Much care was taken in these reports also to demonstrate the useful potential role that could be played by ELSI in the development of the Italian electronics industry.

The Raytheon Company invested many billions of lire to set up this industrial organization with its plants, trained personnel, products and markets. In view of the increasingly competitive markets it is unfortunately clear that the company cannot continue to exist without strong support from Italian sources.

The Management has clearly indicated the minimum indispensable aid which must be forthcoming from one or more strong Italian partners in order to guarantee the long-term economic health of the company. In recent weeks talks of greater than usual intensity have been held with many top-ranking members of the national and regional Governments. Unfortunately, these talks have not given rise to any positive offers capable of satisfying Raytheon-ELSI needs. In view of the circumstances, the Board of Directors, with great sorrow and disappointment, could only take the above decisions.

The Board of Directors.

Document 22

LETTER TO MR. BUSACCA, DATED 29 MARCH 1968

[Italian text not reproduced]

(Translation)

Raytheon-ELSI S.p.A.

[On the original the stamp
with the date 29 March 68
is visible. *(Signed)*]

Dear Mr. Guido Busacca,

For many years Raytheon-ELSI has been suffering heavy losses. In their awareness of the company's importance for the people of Sicily and Palermo our shareholders have made contributions amounting to many billions of lire to promote the company's success.

Over the past 12 months the Management has made considerable efforts to obtain capital and new products from many government and industrial sources. Unfortunately these efforts have come to nothing. Raytheon-ELSI is therefore compelled to cease its activities as it is rapidly approaching a situation in which operating resources will be totally lacking.

As a consequence the Management is compelled to dismiss all its employees. Only a small number of persons will be retained to carry on all the tasks involved in managing the administrative, commercial and technical aspects raised by the cessation of the company's activities. This small number of persons will also be required to organize and see to the prompt payment of everything owing to the employees dismissed.

It is with deep regret that we hereby notify you of your immediate dismissal for the above-mentioned reasons. In order to help you find another job, the company agrees to exonerate you from any duties prior to or after the period of notification which would be worked in normal circumstances. Consequently, as from today, your services are no longer required as the company has no longer any work to offer.

You will be paid an amount in lieu of notification equal to your normal pay for the period of lack of notification. This period will be valid for the purpose of calculating your severance pay and any other sum owing to you, in accordance with existing legislation and agreements. It will be the Management's responsibility to inform you as soon as possible of the total amount owing to you, as well as of current provisions for its payment and of all the relative administrative procedures.

The Management wishes to express its appreciation for the work you have done for the company and sincerely hopes you will find a suitable new job in the near future.

Raytheon-ELSI S.p.A.

The Managing Director
(Signed)

The Managing Director
(Signed)

Document 23

SECURITIES AND EXCHANGE COMMISSION FORM 10-K — ANNUAL REPORT PURSUANT TO SECTION 13 OR 15 (D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED 31 DECEMBER 1971

[Not reproduced]

Document 24

SECURITIES AND EXCHANGE COMMISSION ANNUAL REPORT PURSUANT TO SECTION 13 OR 15 (D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED 31 DECEMBER 1971

[Not reproduced]

Document 25

FEDERAL RESERVE BANK OF NEW YORK CIRCULAR NO. 6090 OF 4 JANUARY 1968

[Not reproduced]

Document 26

SPEECH DELIVERED BY ROBERT T. SCOTT, VICE-PRESIDENT, TAX-LEGAL, NATIONAL FOREIGN TRADE COUNCIL IN PHILADELPHIA, PENNSYLVANIA, ON 9 OCTOBER 1968, AT THE EIGHTH ANNUAL TAX CONFERENCE, UNIVERSITY OF PHILADELPHIA

[Not reproduced]

Document 27

FEDERAL RESERVE BANK OF NEW YORK CIRCULAR NO. 6102 OF 25 JANUARY 1968

[Not reproduced]

Document 28

D.LGS. 12 FEBRUARY 1948, NO. 51, "APPROVAL OF THE NEW STATUTE OF ISTITUTO PER LA RICOSTRUZIONE INDUSTRIALE (I.R.I.)"

[Italian text and English translation not reproduced]

Document 29

"THE ONLY ANSWER FROM IRI AND FINMECCANICA IS: HANDS OFF GIE. ANSALDO IS BITTER OVER ITS REJECTION", *IL SOLE — 24 ORE*, 3 OCTOBER 1987

[Italian text and English translation not reproduced]

Document 30

"ELSI REPUDIATES UNION AGREEMENTS. REJECTS REQUESTS TO WITHDRAW DISMISSAL NOTICES", *L'ORA*, 10 MARCH 1968

[Italian text and English translation not reproduced]

Document 31

R.D.L. No. 5 of 23 January 1933 Setting Up of the "Istituto per la Ricostruzione Industriale", with Head Office in Rome

[Italian text and English translation not reproduced]

Document 32

Statement by Professor Pier Giusto Jaeger, Dated 17 June 1988

1. Since November 1974, I have been a Full Professor of Commercial Law at the University of Milan Law Faculty. Previously, I had been a Full Professor of Commercial Law at the University of Parma, School of Economics, having been appointed in 1968. In 1958, I graduated at the University of Milan Law School, and, afterwards, I received the post graduate degree of Master of Laws from the Harvard Law School.

I am founder and editor of the legal review *Giurisprudenza Commerciale*. I have written many articles and one book: *La separazione del patriminio fiduciario nel fallimento*, Milan, 1968, on bankruptcy law, besides many works and one Casebook on corporation law. I am admitted to practise before the Cassation Court of Italy, and I am a senior partner in a law firm in Milan, dealing mostly with corporate law and bankruptcy law. Among our clients, we counsel several large multinational corporations, such as Union Carbide, International Foods and Beatrice. I have followed some of the most important bankruptcy and arrangement proceedings which have taken place in Italy in the last ten years, such as Rizzoli-Corriere della Sera and Mach Oil Refineries, in the capacity either of lawyer or trustee and commissioner.

I have been retained to analyze some aspects of the case before the International Court of Justice between the United States of America and Italy, concerning Elettronica Sicula S.p.A. (ELSI), and to give my opinion on the question whether ELSI was in 1968 under a legal obligation to file a petition in bankruptcy or had at that time an option to proceed to a voluntary winding up. In order to render this opinion, I have reviewed the Memorial of the US Government, the Counter-Memorial submitted by Italy, the documents attached thereto, and the opinion given by my collegue and friend, Professor Franco Bonelli.

2. *The facts of the case*. The facts of the case are clear and undisputed. It has been ascertained that ELSI had lost most (if not all) its capital and was in the position to satisfy no more than 50 per cent of the amount owed to the unsecured creditors.

3. *No alternative between bankruptcy and voluntary winding up*. In this situation, it is my firm belief that the Board of Directors of ELSI should have filed a petition in bankruptcy, or at least, requested from the Palermo Tribunal to be admitted to the procedure of judiciary settlement *(concordato preventivo)*.

Bankruptcy *(fallimento)* and judiciary settlement *(concordato preventivo)* are the two procedures provided for by the Italian Bankruptcy Act of 1942, which have the same legal and economic basis, i.e., the insolvency of the debtor. There is another procedure, called "controlled administration" *(amministrazione con-*

trollata), which however needs another requirement, consisting in the "transient difficulty" of the same debtor to pay his current creditors. In other words, the debtor filing a petition to be admitted to the procedure of "amministrazione controllata" has to submit to the Tribunal a plan showing that within a certain period of time there is a reasonable probability that his financial "difficulty" will be overcome. Obviously this was not the case for ELSI, the crisis of which was permanent and bound to worsen, without any hope of improvement, as shown in the affidavits of Messrs. Cammarata and Ravalico.

On the other hand, the procedure of judiciary settlement can be requested by the insolvent debtor if he shows to be able to pay all his secured creditors and at least 40 per cent of the unsecured amount of debts. This procedure may be defined therefore as an alternative (in given cases) to bankruptcy, which however is not compulsory, because it requests the debtor's initiative. On the other hand, voluntary winding up does not request such an alternative. The demonstration of this point is rather easy.

First of all, these legal institutes have "very different purposes and effects: (voluntary winding up) leads to the dissolution of the corporate organization and assets and to the distribution of the resulting sum, after the creditors' satisfaction, among the shareholders, whereas (bankruptcy) has the only scope of a compulsory and *pro rata* satisfaction of the creditors" (R. Costi, *Chiusura del fallimento sociale per insufficienza dell'attivo ed estinzione della società, Giur. comm.*, 1974, I, pp. 327 ff.). Moreover one of the effects of bankruptcy is the legal liquidation of the corporation and, if insolvent, a corporation undergoing a voluntary winding up must be declared bankrupt.

The circumstance, to which Professor Bonelli seems to be inclined to recognize an amount of relevance, that some creditors may consider more satisfactory a settlement for 40 or 50 per cent of value rather than taking the risks connected to bankruptcy, is in my opinion, irrelevant.

The creditors mentioned in Professor Bonelli's opinion are the banks, which, however, have better reasons than that to avoid bankruptcy of their creditors, because the trustee is bound to obtain the annulment of payments obtained by them as preference before the beginning of the procedure.

4. *Cases in which it is legally compulsory to file a petition in bankruptcy.* According to Article 6 of the Italian Bankruptcy Act of 1942 bankruptcy *may* be requested by the creditors. Most authorities believe therefore, that the debtor has a legal possibility (or even the right) to be declared bankrupt, which means that the Board of Directors of a Corporation can never be blamed if, using their reasonable judgment, they file a petition in bankruptcy. There are some cases, however, in which this step becomes legally compulsory. Article 217, note 4, of the abovementioned Italian Bankruptcy Act makes it a criminal offence (and provides for the imprisonment of the debtor) the behaviour of the person who, not requesting his own bankruptcy, has caused his insolvency to be "more relevant" (if the bankrupt is a corporation, the same provision applies to its Directors).

It can be argued that it is not always easy to establish when this consequence has been caused by the fact that the debtor has omitted to file a petition in bankruptcy; but when the crisis met by the debtor is so heavy, that it is impossible to reasonably foresee any recovery (as certainly was ELSI's case), the Directors are bound to promptly and decisively act in order to avoid, through the bankruptcy, the aggravation of the insolvency.

Milan, June 17th, 1988

(Signed) Pier GIUSTO JAEGER.

I undersigned dott. Francesca Testa a Notary Public in Milan, Italy, do hereby certify this document was signed by Mr. Pier Giusto Jaeger born in Trieste, Italy, on 25 August 1936 resident in Milan, S. Damiano St., No. 4, Milan, Italy 22 June 1988.

(Signed) Francesca TESTA.

Document 33

ARTICLES 41 AND 42 OF THE ITALIAN CONSTITUTION

[Italian text not reproduced]

(Translation)

Article 41

Private economic enterprise is open to all.

It cannot, however, be applied in such a manner as to be in conflict with social utility or when it is prejudicial to security, freedom and human dignity.

The law prescribes such planning and controls as may be advisable for directing and co-ordinating public and private economic activities towards social objectives.

Article 42

Ownership is public or private. Economic commodities belong to the State, to public bodies or to private persons.

Private ownership is recognized and guaranteed by laws which prescribe the manner in which it may be acquired and enjoyed and its limitations, with the object of ensuring its social function and of rendering it accessible to all.

Private property, in such cases as are prescribed by law and with provisions for compensation, may be expropriated in the general interest.

The law lays down the rules and limitations of legitimate and testamentary inheritance and the rights of the State in relation to same.

Document 34

Law No. 835 of 6 October 1950, "Reservation of Supply and Manufacturing Orders for Government Offices, in Favour of Industrial Plants in the Southern Regions and Lazio, and Definition of the Areas to Be Considered as Included in Southern Italy and the Islands"

Article 16 of Law No. 717 of 26 June 1965, "Regulation of Actions for the Development of the South"

[Italian text not reproduced]

(Translation)

LAW NO. 835 OF 6 OCTOBER 1950

Reservation of supply and manufacturing orders for government offices, in favour of industrial plants in the southern regions and Lazio, and definition of the areas to be considered as included in southern Italy and the islands.

1. Government offices are placed under the obligation of reserving the supply and manufacturing orders referred to in Legislative Decree No. 40 of 18 February 1947, to industrial plants, including small-scale and craft industries, in the provinces of Lazio, Abruzzo and Molise, Campania, Lucania, Puglie, Calabria, Sicily and Sardinia, and the territories of the island of Elba. The administrative bodies of the public railways and the navy are placed under the same obligation as regards the supplies covered by Legislative Decrees No. 374 of 14 June 1945, and No. 503 of 15 November 1946.

2. Government offices must publicly issue a separate call, reserved to factories and craft industries in southern Italy and the islands, for competitive bids for a quota of the supply and manufacturing orders of each financial year. This quota must not be less than one-fifth, with the exception of those supplies and manufacturing processes that technically cannot be divided up or that cannot be carried out by the aforesaid companies, as is to be fixed each year with a decree of the Prime Minister, in agreement with the Minister for Industry and Trade, after listening to the views of the governments and the boards of trade, industry and agriculture of the provinces in question. The aforesaid decree will be published in the *Official Gazette*.

The percentage that is excluded from the quota of one-fifth will, however, be recovered with a proportional increase in the manufacturing and supply orders that the companies in the regions referred to in Article 1 are able to fill, so as to reach a quota that is not less than one-fifth of the supply and manufacturing orders for each financial year.

REGULATION OF ACTIONS FOR THE DEVELOPMENT OF THE SOUTH

16. *Reservation of 30 per cent of the supply and manufacturing orders of government offices.* Without prejudice to the regulations contained in law No. 835 of 6 October 1950, and respecting the more favourable dispositions contained in the laws in force, the percentage of supply and manufacturing orders laid down in the aforesaid law No. 835 is raised to 30 per cent in favour of industrial and craft enterprises located in the territories listed in Article 3 of law No. 646 of 10 August 1950 and its later modifications and additions.

The same percentage is also applied to all the territories listed in Article 1 of law No. 835 of 6 October 1950 and its later modifications and additions.

The following are obliged to observe this quota: government offices, government agencies, and also State corporations indicated with a decree of the Prime Minister, issued following the proposal of the Minister for Special Measures in the South, in agreement with the Minister for Industry and Trade.

Each year the aforesaid government offices and agencies present the Minister for Special Measures in the South and the Minister for Industry and Trade with a report containing information on the overall assignment of orders for supplies and manufacturing, specifying the quota reserved to the industrial and craft enterprises located in the territories indicated in the first paragraph above.

Within six months of the entry of the present law into force, the procedures for applying the provisions contained in the present article are to be laid down in regulations for implementation issued following the proposal of the Minister for Special Measures in the South and in agreement with the Minister for Industry and Trade

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Document 35

LAW NO. 1589 OF 22 DECEMBER 1956, "INSTITUTION OF THE MINISTRY OF STATE ECONOMIC PARTICIPATION"

[Italian text not reproduced]

(Translation)

INSTITUTION OF THE MINISTRY OF STATE ECONOMIC PARTICIPATION

Article 1. The Ministry of State Participations in Industry is hereby instituted.

Article 2. All tasks and prerogatives which, in compliance with existing provisions, fall within the competence of the Ministry of Finance, are hereby devolved upon the Ministry of State Participations in Industry as far as participations so far managed by the former Ministry, and State-owned enterprises are concerned.

All tasks and prerogatives which, in compliance with existing provisions, fall within the competence of the Council of Ministers, the Presidency of the Council of Ministers, the Ministers Committees or the individual Ministries in connection with IRI (translator's note: Institute for Industrial Reconstruction), ENI (translator's note: National Agency for Hydrocarbons), and of all the other enterprises directly or indirectly State-controlled, are devolved upon the aforementioned Ministry. Such enterprises shall be indicated in the decrees issued by the President of the Council of Ministers, in agreement with the Minister for State Participations in Industry and the Minister involved.

The decrees shall be published in the *Official Journal of the Republic of Italy*.

All State-owned enterprises and participation shares referred to in the previous subparagraph are transferred to the Ministry for State Participations in Industry.

The tasks and prerogatives falling within the competence of the Ministries of the Treasury, Industry and Trade, in connection with the Fund for the financing of mechanical industry (FIM), are also devolved upon the new Ministry.

Article 3. The participations referred to in the foregoing article shall be inserted in the framework of independent management bodies, operating according to cutting-down-on-expenses criteria.

The first enforcement of participations shall have to be carried out within one year after the coming into force of the present law.

The associative relations between the mainly State-controlled enterprises and the trade unions of the other entrepreneurs shall cease within one year of the entry into force of this law.

This provision does not concern the companies and bank concerns, indicated in Articles 5, 40, paragraph *(a)*, 41 of the royal law decree No. 375 of 12 March 1936, and subsequent amendments, in Article 1 of the legislative decree of the provisional Head of State of 23 August 1946, No. 370, and in Article 1 of Law No. 445 of 22 June 1950.

4. In order to co-ordinate the activity of the Ministry of State Economic Participation with the activity of the other Ministries concerned, as regards the determination of the general guidelines relative to the various sectors controlled by the Ministry, a standing Committee is set up; it is constituted — in addition to the Minister of State Economic Participation —, by the Ministers of the Budget, of the Treasury, of Industry and Commerce, of Labour and of Social Security. This Committee is charged with the yearly examination of the results achieved in the various sectors.

The Committee is chaired by the President of the Council or — upon his mandate — by the Minister of State Economic Participation. The other Ministers concerned may be invited to participate in its meetings.

5. The Minister of State Economic Participation is a member of the Interministerial Committee for Reconstruction, the Interministerial Committee of Credit, the Interministerial Committee of Prices and the Ministers' Committee for Southern Italy.

6. The Ministry of State Economic Participation is constituted by a general Inspectorate, a Service for administrative affairs and personnel and a Service for economic affairs.

The Inspectorate is presided over by an official who shall be appointed General Director by decree of the President of the Republic, upon a deliberation of the Council of Ministers. Each of the two Services is presided over by an official who shall be appointed General Inspector.

During the first implementation of this law, and for no longer than five years, the posts under the previous paragraph may be assigned also to persons who do not belong to the Ministry, to be appointed by decree of the Minister of State

Economic Participation, subject to a deliberation of the Council of Ministers. Such assignments may be revoked any time. The central Counting-House, which depends from the Ministry of the Treasury, is set up at the aforementioned Ministry.

7. The Government is charged — within 12 months from the entry into force of this law — to organize the Ministry and to create the posts for the strictly necessary permanent staff, in relation to the real needs of the services, for an amount of no more than 100 posts, as well as the regulations concerning the personnel, on the basis of the criterion of transferring staff belonging to other Ministries to the Ministry of State Economic Participation, and of publishing competitive examinations for any post of the career.

8. Until the posts for the permanent staff — under Article 7 — are created, the Ministry of State Economic Participation may employ — on the basis of a temporary posting — no more than 100 persons (permanent and temporary staff) of other Ministries, to be subdivided — according to the career and category — by virtue of a decree of the President of the Council, in agreement with the Minister of State Economic Participation and with the Minister of the Treasury.

Moreover, specific professional assignment may be conferred — on a temporary basis — upon technical experts who are not directly employed by the Ministry, with a pay to be established by a decree of the President of the Council of Ministers, in agreement with the Minister of State Economic Participation and the Minister of the Treasury.

9. As regards the expenses necessary to the functioning of the Ministry of State Economic Participation and to the fulfilment of its tasks in connection with the State-owned enterprises until the relative budget is approved, such expenses shall be covered by the allocations of the expenditure estimate of the Ministry of Finance, concerning the services transferred to the Ministry of State Economic Participation, supplemented with the amounts to be transferred from the other Ministries, for the respective services for which the Ministry is competent.

The new overheads shall be covered by withdrawing an amount — up to 25 million Lire — on the Chapter No. 627 of the budget of the Ministry of the Treasury for the fiscal year 1956-1957.

The Minister of the Treasury is authorized to implement the necessary budget amendments by virtue of his own decrees.

10. The last balance sheet and a plan for each of the autonomous administrative bodies provided for in the first paragraph of Article 3 are submitted to Parliament, enclosed with the budget estimate of the Ministry of State Economic Participation.

11. This law comes into force the day after its publication in the *Official Bulletin of the Republic of Italy*.

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